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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1043.

THE COVINGTON AND CINCINNATI ELEVATED RAILROAD AND TRANSFER AND BRIDGE COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED OCTOBER 18, 1893.

(15,427.)

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INDEX.

	Original.	Print
Caption	*a*	1
Transcript from Kenton circuit court	1	1
Order filing indictment	1	1
Indictment	1	1
Order entering appearance for defendant and setting case for trial	3	3
Order filing demurrer	3	3
Demurrer	3	3
Submission and agreement	4	3
Judgment, May 17, 1890	4	3
Opinion of criminal court	4	3
Order filing motion for new trial	9	6
Motion for new trial	9	6
Order overruling motion for new trial and granting appeal	9	6
Bill of exceptions	10	6
Order filing opinion and mandate of court of appeals	10	6

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	Original.	Print.
Opinion of court of appeals	10	7
Mandate of court of appeals	28	16
Order redocketing case and overruling demurrer	28	16
Order filing demurrer	28	16
Demurrer	29	16
Order overruling demurrer	29	17
Submission and agreement	29	17
Order of May 16, 1899, as to submission, &c	30	17
Order finding defendant guilty	30	17
Order overruling motion in arrest of judgment	30	17
Judgment, September 27, 1803	30	17
Order filing motion for new trial	30	17
Motion for new trial	31	18
Order overruling motion for new trial	32	18
Order allowing bill of exceptions	32	18
Bill of exceptions	32	18
Exhibit A—Statement of facts	32	19
Affidavit of Richard C. Rohner	32	19
Agreement as to statement of facts	37	21
Charter of Pier Bridge Co	39	22
Charter of Ohio and Kentucky Bridge Co	48	26
Act of Congress to authorize the Covington and Cincinnati Elevated Railway Transfer and Bridge Co. to erect a bridge across the Ohio river	49	27
Articles of consolidation in Ohio	50	27
Articles of consolidation in Kentucky	55	31
Objections to evidence	61	33
Judge's certificate to bill of exceptions	62	34
Order allowing appeal to court of appeals	62	34
Supersedeas bond	62	34
Supersedeas	63	34
Clerk's certificate	63	35
Statement on appeal	63	35
Order to docket and submit	64	35
Judgment	64	35
Certificate of Federal questions involved	65	36
Opinion	67	37
Writ of error	68	37
Bond on writ of error	70	38
Power of attorney to execute bond	71	39
Clerk's certificate	72	39
Citation	73	40
Proof of service of citation	74	40

a *Pleas.*

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals held in and for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 3d day of October, A. D. 1893.

Caswell Bennett, chief justice; W. S. Pryor and J. H. Hazelrigg, associate judges, sitting.

Caption.

COVINGTON & CINCINNATI ELEVATED RAILROAD AND TRANSFER & BRIDGE COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Be it remembered that heretofore, to wit, on the 3 day of October, A. D. 1893, the appellant, by counsel, filed in the office of the clerk of the Kentucky court of appeals a transcript of record in words and figures following, to wit:

1 Pleas before the honorable the Kenton circuit court, at the court-house, in the city of Covington, on the 27th day of September, 1893.

Hon. Geo. G. Perkins, judge.

THE COMMONWEALTH OF KENTUCKY
vs.
THE COVINGTON AND CINCINNATI ELEVATED RAILROAD AND TRANSFER AND BRIDGE COMPANY, Defendant. — No. 3914. Misdemeanor.

At a criminal court for said county, on May 9, 1890—

Filing of Indictment.

"The grand jurors came into court, and, by their foreman in their presence, presented the following-named indictment: The Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company charging illegal tolls, &c.; which indictment was filed."

Said indictment is as follows:

Kenton Criminal Court.

THE COMMONWEALTH OF KENTUCKY
vs.
THE COVINGTON AND CINCINNATI ELEVATED RAILROAD AND TRANSFER AND BRIDGE COMPANY.

The grand jury of Kenton county, in the name and by the authority of the Commonwealth of Kentucky, accuse the Covington

and Cincinnati Elevated Railroad and Transfer and Bridge Company of the offense of unlawfully demanding, charging, collecting, and receiving illegal bridge tolls and refusing to sell tickets for toll at rates required by law and failing and refusing to keep an office for the sale of tickets at its bridge, in the county of Kenton.

Committed.

2 The said Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company, on the — day of May, 1890, in the county and State aforesaid, and before the finding of this indictment and on divers days preceding the finding of this indictment, being then and there a corporation under the laws of the State of Kentucky, owning, controlling, and operating a bridge spanning the Ohio river from a point in the city of Covington, in said county, to a point in the city of Cincinnati, in the county of Hamilton, State of Ohio, did unlawfully charge, collect, demand, and receive from divers persons whose names are to the jurors unknown for passage over said bridge toll, fare, and compensation greater and in excess of the following rates, viz., for persons passing over said bridge 1 cent for a single crossing, and did then and there unlawfully prevent persons whose names are to the jurors unknown from passing across said bridge who offered to pay one cent for a single crossing and tendered said sum for such passage, and did then and there fail and refuse to sell to divers persons whose names are to the jurors unknown tickets good for twenty-five crossing on said bridge for the sum of twenty cents, said sum being so then and there tendered for and such tickets demanded, and did then and there unlawfully fail and refuse to have and keep at said bridge and within the county of Kenton and Commonwealth of Kentucky an office and there have continuously on sale, between the hours of 6 o'clock a. m. and 8 o'clock p. m. of each and every day, such tickets, viz., 25 crossings for 20 cents.

3 All of which being contrary to and in defiance of the provisions of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act approved February 9th, 1886, and entitled "An act to amend an act entitled An act to incorporate the Covington and Cincinnati Pier Bridge Company, passed April 4th, 1884," approved April 9th, 1890, and also an act entitled "An act to regulate bridges spanning the Ohio river from points within the county of Kenton and tolls on same," approved April 9th, 1890, and against the peace and dignity of the Commonwealth of Kentucky.

W. W. CLEARY,
Att'y for the Commonwealth.

Witnesses:
W I. DREW.
W. H. STAMPER.
THOS. J. KITE.

And thereafter, on the same day, the following order:

Appearance.

"The defendant, by W. M. Ramsey, attorney, entered its appearance. This case was set for trial on the 9th day of this term."

At the same court, on May 16, 1890—

"The defendant filed a demurrer in writing."

Said demurrer is as follows:

First Demurrer.

The defendant now enter*ing* its appearance and demurs to the indictment herein, and—

1. Says the said indictment does not state facts — constitute a public offense.

4 2. The facts state- in said indictment do not constitute a public offense.

THE COVINGTON AND CINCINNATI ELEVATED RAILROAD AND TRANSFER AND BRIDGE CO.,
By W. H. JACKSON, *Its Att'y.*

At the same court, on the same day, May 16, 1890—

First Submission and Agreement.

"By consent this case was submitted on said demurrer and for decision pending the demurrer and without prejudice to the same to the court without the intervention of a jury, and it was agreed that the statements of fact contained in the indictment be admitted as true on the trial as well as on the demurrer. The written statement of facts filed by defendant, marked A, is to be considered by the court subject to the objection of the Commonwealth for competency or relevancy."

At the same court, on May 17, 1890—

First Judgment.

"The court filed a written opinion and adjudged that the indictment herein be dismissed and the defendant discharged."

The said written opinion is as follows:

Opinion of Criminal Court.

This case must be decided the same way and for the same reasons as the foregoing one, No. 3915, unless the statute of Kentucky, known as the law of 1856, interposes itself and saves to the

5 legislature control over the rates fixed by the act of incorporation.

The charter under which this company operates authorized it to build a railway bridge with wagon-ways and footways and to charge a rate of toll on such ways equal to the tolls charged on the suspension bridge upon January 1st, 1886, which were materially in excess of the rates fixed in the Goebel bill.

The Kentucky statute is that "all charters and grants of or to corporations or amendments thereof enacted or granted since the 14th February, 1856, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed, provided that whilst privileges and franchises so granted may be changed or repealed no amendment or repeal shall impair other rights previously vested." In some States this or a like provision is incorporated in the Constitution and is a permanent irrepealable power that cannot be limited or surrendered. The right to repeal or amend legislative grants under the Kentucky statute, being itself but the expression of the will or purpose of the legislature for one particular session, cannot bind any succeeding legislature which may choose to make a contract *no* subject to be altered or repealed or a grant that will operate to establish a right which cannot afterwards be taken away.

New Jersey *vs.* Yard, 95 U. S.

The Kentucky statute itself contemplates that grants will be made intended at the time not to be within its operation, and that
6 charter privileges will also be conferred that will result in vesting rights that cannot be destroyed by subsequent legislation.

The legislature may repeal a charter and destroy a franchise, as in Griffin *vs.* Ky. Insurance Co. (3 Bush.), where the right to repeal an insurance charter was affirmed on the ground that it was a mere gratuity and no vested proper right was affected, but the legislature, after authorizing the expenditure of money in the construction of some permanent improvement for public use, cannot destroy the property or its capacity to produce revenue, which is itself property. If the franchise of this company were taken away by a repeal of the charter, it would still have the right to collect tolls for the use of the bridge and such tolls as would produce a fair revenue on the investment.

The case of Sage *vs.* Dillard, 15 B. Mon., 340, was where the Western Baptist Theological Institute refused to accept an amendment to its charter appointing sixteen additional trustees, and it was held not only that the legislature had not such power, but "that a reservation by the legislature in the charter to alter, repeal, or amend does not imply power to alter or change the vested rights required by the corporators under the charter and to add new parties and managers without the consent of the corporators."

In Orr *vs.* Bracken Co., 81 Ky., 593, the court of appeals said "the right to amend the charter may be expressly reserved, but that right does not confer the power of taking from the corporators the control of the corporate property or to change the object of the charter by taking away fro- those having a right to select
7 their officers under the charter that right and placing it in the hands of those whose stock by reason of the increased power conferred by the amendment are enabled to control the corporation."

By the charter of the Cumberland and Ohio railroad, passed

subsequent to 1856, Barren and other counties were authorized to vote subscriptions to its capital stock. After the vote of Barren county in favor of a subscription and before the subscription was actually made the legislature on March 11, 1873, amended the railroad charter, prohibiting the county judge of Barren county from issuing bonds for the payment of the subscription voted until the road was put under contract through the county, and then only upon the monthly report of the local engineer of the estimates of the value of the work actually done in the county. By the original charter the company was to receive at once bonds to an amount equal to the stock subscribed.

In Cumberland & Ohio Railroad *vs.* Barren Co. (10 Bush., *box*) the court, of course, held that the subscription not having been completed no contract was impaired by the amendment, as none had been made. The court did not undertake to decide, because the question was not presented, what limit the Federal Constitution imposed upon the power of the States to legislate with regard to such subscriptions, but it said that "it is very clear that unless before the passage of the act of March 11, 1873, the contract of subscription had been fully consummated the act does not fall within the constitutional inhibition. Unless the county was absolutely bound to take the stock and deliver its bonds in satisfaction of the subscription, the contract or negotiation remained executory in its nature and was still subject to the control of the
8 legislature." Again, unless we can ascertain from the agreed facts with reasonable certainty that the county of Barren had actually completed the contract of subscription for the stock in the mode prescribed by the company's charter anterior to the 11th March, 1873, the act passed and approved on that day will be treated as constitutional and valid.

And again, "As we cannot determine that the contract had been fully completed before the passage and approval of the act we cannot adjudge that it constituted such a contract as is contemplated by the clause of the Federal Constitution which inhibits the State from passing laws impairing the obligation of contracts."

It is made too plain for controversy that had the subscription been actually made the court would have pronounced the amendment unconstitutional because it materially affected a previously vested property right.

In 1884, with full knowledge presumably by its members of the irrepealable privileges it was conferring, the legislature passed the charter in controversy authorizing the collection of tolls therein named, and at about the time of the completion of the bridge, and the legislature passed the act materially reducing the rates fixed in the charter which, under the law and all the decisions, was an undoubted injury to a property right that by the solemn promise of the original charter had become vested and was beyond the reach of the legislature to impair.

It was the place of the contracting parties to look to the terms, and if not all the advantages accrue that were ex*cep*ted or if
9 a bad bargain was made it is not for the courts to adjust the

inequalities by sanctioning the right of one of the parties to make new terms and vary the contract without the consent of the other.

The finding in the case will also have to be for the defendant and the indictment dismissed.

At the same court on the same day, May 17, 1890—

"The Commonwealth excepted and filed a motion and grounds for a new trial; to which motion the defendant objected."

The said motion and grounds are as follows:

First Motion; New Trial.

The Commonwealth of Kentucky moved the court to set aside the judgment herein and grant her a new trial for the following grounds, viz:

1st. The judgment and decision is contrary to the law.

2nd. The judgment and decision is not sustained by and is contrary to the evidence.

3rd. The court erred in not sustaining the objection of the Commonwealth to the paper marked "—," and is considering the same as evidence, it being incompetent.

W. W. CLEARY,
Att'y for Commonwealth.

At a criminal court for said county, on Aug. 30, 1890—

Ruling Thereon; First Appeal.

"The motion for a new trial was overruled and the Commonwealth excepted. The Commonwealth prayed an appeal to the court of appeals, which was granted.

10 The Commonwealth tendered a bill of exceptions, which was signed, filed, and made part of the record."

The said bill of exceptions is as follows:

Be it remembered that on the trial of this case the acts and omissions charged in the indictment against the defendant were admitted to be true and so proved.

That the statements of the paper marked "A" and referred to in order of court of May 16, 1890, *was* considered by the court as proof, the Commonwealth objecting and excepting thereto not on account of form, but because the same is inadmissible on account of irrelevancy and incompetency of its statements as evidence.

GEO. G. PERKINS, *Judge.*

At a circuit court for said county, on June 10, 1893—

"The Commonwealth filed a copy of the opinion and the following mandate:"

The said opinion and mandate are as follows:

Opinion of Court of Appeals.

Opinion of the court delivered by Judge PRYOR:

These three cases will be considered together, as similar questions are involved on each appeal.

The bridge company, the appellant in the one case and the appellee in the other, was indicted for its refusal to comply with the provisions of an act of the legislature, passed on the 31st of March, in the year 1890, regulating the tolls to be charged for those passing over its bridge on foot, in vehicles, or otherwise, and also for refusing to comply with the provisions of the same act that also
11 regulated the charges on its ferry that it had purchased under legislative authority and was operating *it* in transporting freight and passengers across the Ohio river between the cities of Covington and Cincinnati, &c.

The Covington & Cincinnati Elevated Railroad and Transfer and Bridge Company was indicted for violating the same statute and in like manner.

It is contended and was so adjudged by the court below that the legislation of March, 1890, reducing the toll on both bridges, was in violation of section 10, art. 1, of the Constitution of the United States, prohibiting the passing of laws impairing the obligation of contracts, and also of section 20 of art. 3 of the constitution of this State, containing a like provision.

In regard to the ferry it is also maintained that the reduction of tolls by the act of 1890 has so lessened its revenues as to place the receipts below the expenses, and that its effect is to destroy the franchise, and is equivalent to the taking of private property for public use without compensation or the appropriation of private property for the use of the public without due process of law.

On the 17th of February, in the year 1846, the charter of the appellee was passed, and with its capital stock fixed at $300,000, and the provision in relation to the rates of toll to be charged for the transportation — live stock, passengers, &c., over its bridge between the cities of Covington and Cincinnati is found in section 8 of the act of incorporation, that reads as follows: "That the president
12 and directors shall have the right to fix the rates for toll for passing over said bridge and to collect the same from all and every person or persons passing thereon with their goods, carriages, or animals of every description or kind, provided, however, that the said company shall lay before the legislature of this State a correct statement of the cost of said bridge and an annual statement of the tolls received for passing the same, and also the cost of keeping said bridge in repair and of the other necessary expenses of the company, and the said president and directors shall from time to time reduce the rates of toll so that the net profits of said bridge shall not exceed fifteen per cent. per annum after the proper deductions are made for repairs and charges of other descriptions. Toll-gates shall be kept and tolls received at each end of the

bridge and the rates of toll shall be posted up in some conspicuous place where toll is demanded."

On the 5th of February, 1861, the capital stock was increased to one million of dollars and the company also authorized to issue one-half of the amount in preferred stock, provided "that it shall be lawful to prefer such stock to the extent of fifteen per cent. per annum and no more."

By an act approved on the 21st of January, 1865, the capital stock was increased to one million two hundred and fifty thousand dollars, the additional two hundred and fifty thousand dollars to be held as preferred stock. The bridge was opened for travel in the year 1867, after a struggle for near twenty years to raise money in order to secure its completion. The record shows that
13 this bridge cost (its construction) $1,785,000, and the receipts from the bridge since its construction shows a payment of — to the preferred stockholders on an average of 7.8 per cent. per annum, and the net earnings during that period would have paid on the original cost 4.82 per cent. per annum.

In a controversy between the non-preferred and the preferred stockholders, coming to this court by an appeal and reported in 10th Bush., it was held that the action of the board in issuing preferred stock was legal, and the entire earnings have been applied, after paying expenses, to those who hold the preferred stock, and they are realizing a handsome dividend on the investment and will receive as much as six per cent. on the reduction of the tolls as made by the act of 1890.

Such is the history of this great enterprise from the grant of its charter, in the year 1846, up to the passage of the act of 1890, by which the power to fix the tolls was taken from the grantee and assumed by the grantors, for the reason, as the State maintains, that no contract ever existed between the State and the bridge company by which legislative control in the regulation of tolls was surrendered. We understand the rule to be well settled by the numerous decisions of the Supreme Court that the regulation of tolls or other charges made by a corporation or an individual for the use of his or its property by the public is a governmental power, and when such a power is contracted away by the sovereign it must be done by positive grant or the use of such language in the charter or grant as carries with it necessarily an abandonment of legislative control.

14 The question therefore arising in this case is: Did the legislature by section 8 of appellee's charter surrender its power to regulate the toll on appellee's bridge so long as the company realized not exceeding fifteen per cent. on the investment.

It is true, as maintained by the State, that no repeal has been made of the right of the appellee to make fifteen per cent. of annual net profit, but when the tolls are reduced at least twenty-five per cent. less than the rates fixed by the corporation it must be assumed that no such income can be realized as fifteen per cent. per annum, and if a contract exists it must be regarded as impaired by the legislation

of 1890, as under that act the annual net profits will be greatly reduced.

The case of Hamilton *vs.* Keith, reported in 5th Bush., comes nearer sustaining the views of counsel for the appellee and the judgment below than any case to which our attention has been called. The charter of the Covington & Lexington Railroad Company was amended on the 5th of February, 1854, as follows: "The rates of freight to be charged by said company shall be fixed by the directory and may be by the ton, hundred, car, or specific article, provided when the charge shall be by the ton or barrel the through rate shall not exceed three and one-half mills per mile per one hundred pounds nor one cent per mile per barrel and other through rates in proportion." By another amendment of March, 1865, the company was authorized to increase their legal rates twenty-five per cent. on freight and passengers from Covington to Lexington, and *vice versa*.

By an act passed in the year 1869 the sixth section of the amended charter of 1854 was repealed and a tariff of way
15 freights established not to exceed for fifty miles or over twenty-five per cent. per mile over the rates of through freights. Hamilton tendered a lot of freight and demanded that it be carried at the rates established by the act of 1869, and, the company refusing, an action was instituted against the company, and this court held that the 6th section of the amended act of 1854, providing that "the company might charge such rates of freight as shall be fixed by the directors," was a contract, and for the reason that it became a part of the charter, that was as inviolable as any other privilege conferred, and therefore in violation of both the Federal and State Constitutions. The opinion in that case was a clear misconception of the doctrine of the Dartmouth College case and was delivered before any adjudication of the Supreme Court in regard to the governmental powers of State legislatures in reference to grants made private corporations where private property was clothed with a public use, and for that use found the public required to pay certain rates or charges to the corporation. Mr. Justice Cooley in treating of that clause of the Federal Constitution forbidding the States to pass laws impairing the obligation of contracts says: "And it has been held without dissent that that clause does not remove from State control the rights and properties which depend for their existence or enforcement upon contracts — as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important;" and in reference to charters of private corporations he says: "Al-
16 though these charters are to be regarded as contracts, and the rights assumed by them are inviolable, it does not follow that these rights are at once by force of the charter contract removed from the sphere of State regulation, and that the charter implies an undertaking on the part of the State that in the same way in which their exercise is permissible at first and under the regulations then existing, and those only, may the corporations continue to exercise their right while the artificial existence continues;" and in Darthmouth College *vs.* Woodward, 4 Wheaton, it is said:

"The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed."

It is not pretended that the charter of the appellee, The Cincinnati & Covington Bridge Company, can be repealed, because there was no such power reserved in the grant, and the general law now found upon the statute book of the State, where this power is expressly reserved, was not enacted until after the grant was made. Nevertheless this power to regulate tolls over public ways and in this class of cases being the exercise of a governmental power, as must be conceded, its exercise may be resumed at any moment unless by contract the State has surrendered it. We have found no decision of the Supreme Court, since this question as to the right of a State to surrender these governmental powers has been meeted, where private property has been devoted to public use under legislative grants, in which that court has construed the grant as containing stipulations precluding the State from exercis-
17 ing any control over the rates or charges the citizen is required to pay for its use. There are many changes in the condition of the country as well as its people during a period of forty years. What may have been a reasonable rate of toll or income upon such investments forty years ago would now be deemed exorbitant, and before this court should hold that the corporation had the right to a net income of fifteen per cent. per annum to be paid by the public so long as the structure exists, or that this power of government had been delegated to those whose interests were adverse to the public, it should entertain no doubt of the — grant all future legislative control over the subject-matter. The capital stock of this corporation at the time its charter was obtained and the right to charge these tolls given was only $300,000, and has been increased from time to time to one million seven hundred and eighty-five thousand dollars, upon which sum the right to an income of fifteen per cent. per annum is claimed, although the amendments by which this increase of stock was made were enacted, as well as other amendments, since the passage of the general law reserving to the State the power to alter or repeal corporate grants.

In determining the question we feel constrained to follow the decisions of the Supreme Court, because the clause of the Federal Constitution prohibiting the States from enacting laws impairing the obligation of contracts is directly involved, and there should be no reluctance in State courts, even if different views were entertained, in following the decision- of the highest judicial tribunal of the country that must ultimately determine all such questions.

It is necessary, therefore, to refer to some of the leading
18 cases in which the power of State legislatures to regulate charges and tolls over property devoted to public use has been passed on. In the case of Stone against Farmers' Loan & Trust Co., reported in 116 U. S., 636, the twelfth section of the charter of the Mobile &

Ohio Railroad Company was involved. It provided "that it shall be lawful for the company hereby incorporated from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad or way hereby authorized to be constructed, erected, built, or used, or any part thereof;" and in Stone *vs.* Illinois Central Railroad Company, decided at the same time, the charter provision was "that the president and directors be, and they are hereby, authorized to adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper, and the same to alter or change at pleasure."

Chief Justice Waite, in delivering the opinion in the cases cited, after holding that such provisions in a charter did not create contracts between the corporations and the State, refers to a number of cases in support of the conclusion the court had reached, and we shall only refer to one of these cases as showing that no contract existed, when, perhaps, by implication it might be assumed that it was the purpose of the State to surrenderi its taking power, except to the extent taxation had been injured by the charter. In the Delaware R'road tax cases reported in 18th Wallace, where the charter of a railroad provided that "it should pay annually into the treasury of the State a tax of one-fourth per cent. on its capital of $400,000," it was held not to be a contract,
19 as there were no words indicating that no other or further tax should be levied. Many other cases are referred to in that opinion to the same effect, and in the same case, in reviewing the cases in which it has been held that a State legislature could not interfere with the grant, reference was made to the case of Gordon *vs.* Appeal Tax Court, reported in 3 Howard. The statute read "that upon any of the banks of this State complying with the conditions of this act the faith of the State is hereby pledged not to impose any fu-ther tax or bonus on said banks during the continuance of those charters under this act." In the case of Home of the Friendless *vs.* Bonne, reported in 8th Wallace, it was provided that all the property of the corporation should be exempt from taxation, and that the general law reserving to the legislature the power to amend or repeal all charters shall not apply to this corporation. In each of these cases no doubt could well arise as to the intent of the legislature, and, as said by the chief justice in the case of Stone against The Farmers' Loan and Trust Company, "the power of regulation is a power of government, and if it can be bargained away at all it can only be by words of positive grant or something which is in law equivalent." "If there is reasonable doubt it must be resolved in favor of the existence of the power." "The rule is elementary, and the cases in which it has been considered and applied are numerous."

The case of The Georgia Banking Company *vs.* Smith, reported in 128 U. S., the opinion written by Mr. Justice Field, it seems to us, is conclusive of this case as to the power of the legislature to regulate the tolls on the bridge of the appellee. In that case the

20 Georgia Railroad Company was given the exclusive right of transporting and conveying persons, merchandise, and produce over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right, "provided that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles and ten cents per cubic foot on articles of measurement for every one hundred miles" and five cents per mile for every passenger, with another proviso that the company might rent or farm all or any part of the exclusive right to transport, &c., to others, &c. This privilege was given by the Georgia legislature in the year 1835, and the company leased its rights and privileges to one William Wadley in the year 1881.

On the 14th of October, 1879, the Georgia legislature passed an act to provide for the regulation of railroad freight and passenger tariffs in that State and to prohibit the charging of other than just and reasonable rates, and for the violation of which certain penalties were imposed by the commissioners who were designated as the railroad commissioners. The Georgia Banking Co. filed a bill for the purpose of enjoining the commissioner from prescribing rates of fare and freight over its road or its branches. It was contended by the corporation that its charter granted in the year 1835 was a contract between it and the State and invested it with the right to charge the rates fixed by the charter, and this right could not be impaired by any legislation. Mr. Justice Field, speaking for the court, held that so long as the property and enployment was affected with a public use, so long as the use continued, the

21 power of regulation remained with the legislature, and that the difference of opinion entertained in reference to such questions was not as to the power of the State over the subject, but whether that power had not by some provision of the charter or other legislation amounting to a contract been surrendered to the company. There was a proviso in that case as in this. An exclusive privilege was given to transport persons and merchandise, provided that the charge of transportation shall not exceed fifty cents per hundred pounds for heavy freight and five cents per mile for every passenger, and yet the court held there was no contract, saying: "It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the legislature had in 1833 contracted that the company might for all time charge rates for transportation of persons and property over its line up to the limit designated."

The grant to the bridge company is "that the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon with their goods, carriages, or animals of every description or kind."

Those are the words of the grant, and similar in almost every respect to the grant in the case of Stone *vs.* Illinois Central Railroad Company, already referred to and held by the Supreme Court not to constitute a contract, but it is insisted that the proviso consti-

tutes the contract, and this reads, Provided that the company shall perform certain duties, namely, inform the legislature
22 of the amount of tolls received and the expenses of the company in keeping the structure in repair, "and the said directors shall from time to time reduce the rates of toll so that the net profits shall not exceed fifteen per cent. per annum after the proper reductions are made for repairs and charges." It is difficult to find any language in this proviso stronger than in the grant or such as would deprive the legislature of all power to regulate these tolls. The State does not bind itself by saying in express terms or by fair implication that no reduction of tolls shall be made to lessen this rate of interest or the net profits on the investment. There is no contract or agreement in this charter by which the State had agreed that this company shall forever impose such burden on travel, if it sees proper, as will yield fifteen per cent. on the investment. The proviso is only a limitation on the rights and privileges previously granted, and to say that because a limit is designated it creates a contract is not sanctioned by reason of authority.

It is *agreed* that in the case of The Banking Company *vs.* Smith the period for which the charter was to run had expired, and the court was discussing the power of the legislature to enact a law regulating the tolls after the expiration of the grant. Such could not have been the question involved, for if the grant had expired no doubt could arise as to the power of the legislature over the question. It was a decision upon the one question, and that was: Did the terms of the grant to the Georgia Banking Co. create a contract?

It is also contended by the appellee that the classification
23 of and rates for travel and transportation of freight over the bridge of the appellee is a legislative regulation of commerce among the States, and not a charge for the use merely of the structure.

While the regulation of commerce between the States is subject to the control of Congress, for with that body the paramount authority resides, we are unable to perceive how the use of this bridge in aid of commerce and upon which tolls are charged is an interference with Federal power.

There has been no legislation by Congress adverse to this right of the State, and the lessening of tolls, it seems to us, would aid commerce instead of obstructing it in any way. This bridge is not a carrier of commerce, but others who transport commerce are permitted to use it as a means of facilitating trade and travel between the States upon the payment of a reasonable toll, authorized to be exacted by the State.

The bridge spans the Ohio river between the large cities of Covington and Cincinnati. It is a Kentucky corporation, and no burden is imposed upon the carrier of commerce passing over it other than a reasonable charge for its use, and, in the absence of any regulation by Congress fixing the tolls, the power of the State to authorize by legislation the company to make a reasonable charge

for its use is unquestioned and fully sustained by the decisions of the Supreme Court on the subject.

Perackita Packet Co. *vs.* Aiken, 119 U. S., 543; Packet Co. *vs.* Keokuk, 95 U. S.; Mobile County *vs.* Kimball, 102 U. S., 691.

It therefore follows that the act of March, 1890, regulating
24 these tolls is valid and should be enforced, and the case of Hamilton *vs.* Keith, reported in 5 Bush., to the extent it conflicts with this opinion, is overruled. As to the rates of charges fixed by the act of 1890 for transporting freight and passengers over the ferry now owned by the bridge company, it appears from the agreed facts that were read, subject to exceptions for competency, that the rates are so low as not to produce an income sufficient to pay the ordinary expenses in keeping the ferry in repair, and when, looking to the necessary expenses incurred for years prior to the passage of the act of 1890, it is apparent *to* the company would necessarily expend, in complying with the provisions of that act, in operating this ferry, a sum exceeding the gross income, and, if so, the act amounts to spo*il*ation and requires the bridge company to submit to the use of its property by the public without compensation. It is a destruction of the right to operate this ferry and in plain violation of both the Federal and State constitution-. Under the statute of this State ferries are established and regulated by the county courts. This ferry has been operated under the authority of the county court or by special enactment for a great many years, when on the 23rd of February, 1869, power was conferred by an act of the legislature on the bridge company to purchase, hold, and operate ferries, conditioned that the rates of ferries shall be subject to the control of the courts, as in the case of ferries owned by individuals.

The bridge company purchased the ferry under the legislation of February 23d, 1869, and in 1890, by subsequent legislation, the bridge company, by reason of the reduction of tolls, is made to operate its ferry without compensation.

We can well see, conceding the power to regulate the charges
25 on the ferry, it might become necessary to fix a reasonable toll looking to the public interest, although it might not yield a net income on the original investment, but when the law-making power undertakes to so regulate tolls as to require the operation of a franchise at less than the actual operating expenses it is virtually a taking of private property for public use without compensation, as the agreed facts not only show that the tolls are unreasonable, but destructive of the right itself, and when such facts appear courts should interfere; nor do we understand that this view is in conflict with the case of Budd *vs.* People of New York, reported in 146 U. S.; nor would the doctrine be different if the ferry was a chartered corporation created since the act of 1856, reserving the right to amend, &c., and while, under such a reservation of power, the grant itself may be repealed, it cannot be so amended as to leave it in force with such a reduced rate of toll that its income will not pay the expenses of operating it, and yet the corporation required to discharge the duties imposed on it by its charter.

As to the indictment against the Covington — Cincinnati Elevated Railroad and Transfer — Bridge Company, it follows from what has been adjudged in reference to the Covington and Cincinnati Bridge Company that the provision of its charter in regard to toll is not a contract between it and the State, and the legislature, therefore, had the right to regulate the tolls to be charged for the use of footways and wagon-ways, both being a part of the main structure; nor is the legislation in conflict with the commerce clause of the Federal Constitution for the reasons
26 already given. Its charter in relation to tolls provides only "that the rate of toll shall at no time exceed the rate charged by the Covington and Cincinnati Suspension Bridge Company upon January 1, 1886."

When this grant was made there was (and is now) a statute general in its character applicable to all corporations, which is as follows: "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided that, whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." It is well settled that a company taking a franchise under such a general law agrees to abide by its provisions—in other words, it becomes a part of its charter, unless there is some provision in the grant in the nature of a contract or agreement that divested the State of its power. Greenwood *vs.* Union Freight Co., 105 U. S.; Atlantic & Gulf Railroad Co. *vs.* Georgia, 92 U. S.; Cumberland & Ohio R. R. Co. *vs.* Barren County Court, 19th Bush.

It is further argued that the reduction of tolls on the foot and wagon ways over appellee's bridge amounts to a confiscation of the property, and, as in the ferry case, the tolls as reduced by the act of March, 1890, will not pay the expenses of keeping up the two ways.

By the charter the appellee was required to make these ways a part of the main structure, and while the income from the
27 foot and wagon ways may not, when applied to improving them alone or keeping them in repair, be sufficient for that purpose, yet the entire structure may be yielding a handsome income. It is unlike the ferry purchased by the appellee, The Cincinnati & Covington Bridge Company, under the authority of the legislature. The ferry is distinct from the bridge, although the bridge company owns it, while the foot and wagon ways are a part of the transfer company's bridge and the profits on the entire structure must be considered. What these profits are does not appear, and we must assume, in the absence of testimony to the contrary, that the receipts from the structure are in excess of the expenditures, and before this court can undertake to say that the appellee has been deprived of compensation for the use of its property we must be informed as to the revenue received from the entire structure, and in the absence of such a showing will not say that the legislature

in regulating these tolls has violated both the Federal and State constitutions, and more particularly when it has been authoritatively settled in the case of Budd against The People of New York that what are and what are not reasonable charged, &c., is a legislative and not a judicial question.

The judgments below against the State and in favor of each bridge company are reversed and remanded with directions to overrule the demurrers and for proceedings consistent with this opinion.

On the appeal of The Cincinnati & Covington Bridge Company *vs.* Commonwealth, known as the ferry case, the judgment is reversed with directions to dismiss the indictments.

28 Wm. Goebel, Wm. J. Hendrick, Reid Rogers, for Commonwealth; Wadsworth & Sons, W. H. Jackson, W. M. Ramsey, J. W. & C. H. Fisk, O'Hara & Bryan, for the bridge companies.

Copy.

Attest: A. ADDAMS, *C. C. A.*,
By ROB'T L. GREEN, *D. C.*

Mandate.

The court being sufficiently advised, it seems to them the judgments herein are erroneous.

It is therefore considered that said judgments be reversed and causes remanded, with directions to overrule the demurrers and for proceedings consistent with the opinion herein, which is ordered to be certified to said court.

A copy.

Attest:

A. ADDAMS, *C. C. A.*,
By ROB'T L. GREEN, *D. C.*

Issued June 5, 1893.

Second Ruling on First Demur.

Thereafter, at the same court, on the same day, June 10, 1893—

"The case is redocketed and the demurrer is overruled and the defendant excepts."

At a circuit court for said county on Sept. 27, 1893—

"The defendant files a demurrer."

29 The said demurrer is as follows:

Second Demurrer.

The defendant now comes and demurs to the indictment herein, and says that the said indictment does not state facts sufficient to constitute a public offense, and the facts stated in said indictment do not constitute a public offense for the reasons:

1st. The acts of the General Assembly of the State of Kentucky, passed March 31, 1890, and approved April 9, 1890, are in violation of paragraph 1, sec. 10, article 1, of the Constitution of the United

States, which prohibits the enactment of laws impairing the obligation of contracts.

2. The said acts of the General Assembly of Kentucky are in violation of section 1, article 8, of the Constitution of the United States, which vests in Congress the power of regulating commerce among the States.

3. The said acts of the General Assembly of Kentucky were in violation of section 1, 14th amendment of the Constitution of the United States, which forbids the taking of private property without due process of law.

W. H. JACKSON,
Att'y for Def't.

Ruling Thereon; Second Submission.

Thereafter, at the same court, on the same day, Sept. 27, 1893—

"The said demurrer is overruled and the defendant excepts.

This cause is now by agreement submitted to the court for judgment without the intervention of a jury, and is submitted on the same terms and agreements and in accordance with the conditions of the order of May 16, 1890, herein, all of which order of May 16, 1890, is made a part of this order.

The said order of May 16, 1890, is as follows:

Order of May 16, 1890.

This day came the Commonwealth, by her attorney, and the defendant, by its attorneys, and the defendant demurred to the indictment upon the ground only that the facts stated in the indictment do not constitute a public offense, and by consent it is now agreed that this case be submitted on the demurrer and for decision pending the demurrer and without prejudice to the same to the court, without the intervention of a jury, and that the statements of fact contained in the indictment are admitted to be true on this trial, as well as on the demurrer.

The written statement of facts filed by defendant, marked A, is to be considered by the court, subject to the objection of the Commonwealth thereto for competency or relevancy.

Final Finding; Motion to Arrest Judgment and Ruling Thereon; Judgment.

Thereafter, at the same court, on the same day, September 27, 1893—

"The court, being sufficiently advised, finds the defendant guilty and fixes the punishment at a fine of $1,000.

The defendant moves for an arrest of judgment; said motion is overruled, and the defendant excepts.

It is adjudged that the defendant is guilty and that the Commonwealth recover of the defendant $1,000 and her cost herein.

The defendant files a motion and grounds for a new trial."
31 The said motion and grounds are as follows:

Second Motion for New Trial.

The defendant, The Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company, moves the court to set aside the judgment and grant it a new trial upon the following grounds and reasons:

1. The court erred in overruling defendant's demurrer to the first indictment.
2. The court erred in not sustaining defendant's demurrer to the indictment.
3. The court erred in rendering judgment against the defendant for $1,000.
4. The court erred in rendering judgment against the defendant.
5. The judgment of the court is contrary to law.
7. The judgment of the court is contrary to the law and the evidence.
8. The verdict of the court is not sustained by sufficient or any evidence.
9. The verdict of the court is contrary to law.
10. The verdict is contrary to and against the law and evidence.
11. The finding of the court is contrary to law.
12. The finding of the court is not sustained by sufficient or any evidence.
13. The finding of the court is against the law.
14. The finding of the court is against the evidence.
15. The court erred in finding the defendant guilty.
16. The court erred in not dismissing the indictment against the defendant.
32 17. The court erred in not giving judgment in favor of defendant for its costs.

W. H. JACKSON,
Counsel for Defendant.

Ruling Thereon.

Thereafter, at the same court, on the same day, Sept. 27, 1893—
"The motion for a new trial is overruled, and the defendant excepts.
The defendant presents a bill of exceptions, which is signed, filed, and made part of the record."
The said bill of exceptions is as follows:

Bill of Exceptions.

Be it remembered that, this cause coming on to be heard before Honorable George G. Perkins, judge of the Kenton circuit court, the defendant filed written demurrer.

(See page 29.)

And thereupon, by consent of parties, it is agreed that the case be submitted on the demurrer and for decision pending the demurrer and without prejudice to the same to the court, without the intervention of a jury.

(See page 30.)

And thereupon defendant filed a written statement of fact, marked "Exhibit A," headed affidavit.

EXHIBIT A.

Statement of Facts.

Said Exhibit "A" is as follows:

Affidavit.

STATE OF OHIO, *Hamilton County,* } ss:

Richard C. Rohner, being by me first duly sworn, deposes and says that he is the treasurer of the said Covington
33 & Cincinnati Elevated Railroad and Transfer & Bridge Co.; that as treasurer of such company it is his duty to know and he does know the cost of service of maintaining and operating and all other costs connected with said Covington & Cincinnati Elevated Railroad and Transfer & Bridge Co., and it is his duty to know and he does know all of the earnings of the said bridge Co. from its footways and wagon-ways, and that he further knows the amount of bonded indebtedness of said bridge Co. and the amount regularly due for interest on bonds; and affiant says that the cost of the said Covington & Cincinnati Elevated Railroad and Transfer & Bridge Co., with the property necessary thereto, on the 30th day of April, 1890, amounted to the sum of three million three hundred and one thousand six hundred and forty-seven dollars and eighty-three cents ($3,301,647.83), and that on the first day of October, 1887, the said Covington and Cincinnati Elevated Railroad and Transfer & Bridge Co. made and executed to the Metropolitan Trust Co. of New York a certain indenture of mortgage upon all the property rights and franchises of said bridge to secure the payment of three million five hundred thousand dollars' ($3,500,000) worth of bonds issued by said company, bearing interest at the rate of 5% per annum and payable semi-annually on or after the first day of April or October in each year, and that said bonds were of the denomination of one thousand dollars ($1,000) each, and that in said indenture of mortgage it is provided for the sale of said bridge upon its failure for six months to meet and pay the interest accruing upon its said bonds. This affiant says further that the cost of that part or portion of said bridge which is devoted to
34 the use of footways and wagon-ways spanning the Ohio river between Covington, Ky., and Cincinnati, O., is estimated at and is reasonably worth the sum of six hundred thousand dollars ($600,000); that as much as said sum of six hundred thousand dol-

lars ($600,000) was expended in the erection of said wagon-ways and footways as a part of said bridge, and that the bonded indebtedness applying to the part of the bridge devoted to footways and wagon-ways would be six hundred thousand dollars ($600,000) as a reasonable apportionment of the amount upon the whole bridge. Affiant further says that the said bridge was opened to the public travel for foot passengers. vehicles, and passage of animals, etc., on the 2nd day of September, 1889; that the receipts derived from the same, with expenditures for costs of service and interest on bonds from said day to the 30th day of April, 1890, being eight months, — as follows:

Interest on $600,000, at 5 %, for 8 mons.....	$20,000
Expenses for maintaining and operating the footways and wagon-ways of said bridge.....	12,185 91
A total of.....	$32,185 91
And that the receipts for said bridge during the 8 mons. were.....	22,125 39
Leaving a deficit of.....	$10,060 52

This affiant says that he has correctly computed the earnings above stated with the rates fixed by the act of the legislature of Kentucky reducing the rates of toll, viz., "for one person passing over said bridge on foot, 1c. for single crossings or 25 crossings for 20; for vehicles drawn by one horse, 8c. for a single crossing or 8 crossings for 50c. or 16 crossings for $1.00; for vehicles drawn by *three* horses, 15c. for single crossings or ten crossings for $1.00; for
35 vehicles drawn by four horses, 18c. for a single crossing or eight crossings for $1.00; for vehicles drawn by more than four horses, 3c. for every horse more than four; for horse and rider, 5c.; for timber wheels drawn by two horses, 15c.; for timber wheels drawn by four horses, 25c.; for timber wheels drawn by six horses, 35c.; for cattle, horses, or mules, per head, 5c.; for *hoods* or sheep, per head, 2c.; for loads weighing 10 tons or more, 50c., and that the said rates of toll as fixed by the said act of the legislature of Kentucky as above stated, if the same had existed at the opening of the bridge on the said second day of September, 1889, until the 30th day of April, 1890, that the earnings of said bridge would have amounted to only $10,692.37, a reduction from the actual earnings upon the rates then established of $11,433.02c. and making a consequent increase of the deficit of the sum of $21,493.54. This affiant further says that at no time since the opening of said bridge on the said second day of September, 1889, have the earnings of said bridge on the rates of tolls charged and collected been sufficient to pay the expense of maintaining and operating same and meet the interest on bonds applying; herewith submits as correct a statement of the earnings, interest, and bonds, expenses, total expenses, and deficits for the portion of said bridge devoted to footways and wagon-ways for each and every month from the opening

of said bridge on Sept. 2nd, 1889, to April 30th, *1889*, inclusive, to wit:

36 September 2nd, 1889, to April 30th, 1890 (inclusive).

Month.	Earnings.	In. on bonds.	Expenses.	Total ex.	Deficit.
Sept.	$3,063 20	$2,500 00	$1,092 82	$3,592 82	$529 62
Oct.	3,425 24	2,500 00	1,678 03	4,178 03	752 79
Nov.	2,944 89	2,500 00	1,208 98	3,708 98	764 09
Dec.	2,795 01	2,500 00	1,615 52	4,115 52	1,320 51
Jan.	2,081 27	2,500 00	2,416 36	4,916 36	2,835 09
Feb.	2,200 28	2,500 00	1,228 89	3,728 89	1,528 61
March	2,722 46	2,500 00	1,361 16	3,861 16	1,138 70
April	2,893 04	2,500 00	1,584 15	4,084 15	1,191 11
Totals.	$22,125 39	$20,000 00	$12,185 91	$32,185 91	$10,060 52

And affiant further submits as correct a statement of interest on bonds, expenses, and what would have been the earnings and deficits upon that portion of said bridge used for wagon-ways and foot ways if the said rates of toll proposed by the said legislature of Kentucky as above stated ha- been in operation during each of the said months.

September 2nd, 1889, to April 30th, 1890 (inclusive).

Month.	Earnings.	In. on bonds.	Expenses.	Total ex.	Deficit.
Sept.	$1,452 88	$2,500 00	$1,092 82	$3,592 82	$2,139 94
October	1,674 83	2,500 00	1,678 03	4,178 03	2,503 20
Nov.	1,440 04	2,500 00	1,208 98	3,708 98	2,268 94
Dec.	1,329 54	2,500 00	1,615 52	4,115 52	2,785 98
Jan.	1,010 34	2,500 00	2,416 36	4,916 36	3,906 02
Feb.	1,055 75	2,500 00	1,228 89	3,728 89	2,673 14
March	1,301 39	2,500 00	1,361 16	3,861 16	2,559 77
April.	1,427 60	2,500 00	1,584 15	4,080 15	2,656 55
Totals.	$10,692 37	$20,000 00	$12,185 91	$32,815 91	$21,493 54

37 Affiant further says that said bridge has recently been completed and that the said structure is at present entirely new, and that so far there has been no expenses whatever for repairs for ordinary wear and tear upon the said bridge, and that a cost for any such purposes *are* not included in his statement of expenses; that hereafter, as travel over said bridge continues and increases, said bridge will in all probability need some repairs, which will add to the expenses already stated; and further affiant sayeth not.

RICHARD C. ROHNER.

Subscribed in my presence and sworn to before me this 23rd day of May, 1890.

[SEAL.]

JOSEPH MOSES,
Notary Public, Hamilton County, Ohio.

And thereupon it was agreed by and between the plaintiff and defendant that the statement of facts in indictment would be taken and admitted as true for the purpose of trial as well as for the demurrer, and the facts stated in said affidavit, marked "Exhibit A," were admitted as true by plaintiff, The Commonwealth, to be considered by the court as proof upon the demurrer as well as upon the trial of the cause, subject to the objection of the Commonwealth as to the statement of proof as to the matters such as are set out in said affidavit, the Commonwealth objecting to the competency and relevancy thereof, but not objecting to the same for or as to form.

38 Thereupon the Commonwealth read the indictment.
(See page 1.)

And the defendant read said affidavit and Exhibit "A," as also charters of def't and act of Congress and articles of consolidation.
(See page 32 for exhibit.)

39 The said charters, act of Congress, and consolidations are as follows:

Charter of Pier Bridge Co.

An act to amend an act entitled "An act to incorporate the Covington and Cincinnati Pier Bridge Company, passed 4th April, 1884."

Be it enacted by the General Assembly of the Commonwealth of Kentucky, That an act entitled An act to incorporate the Covington and Cincinnati Pier Bridge Company, approved April the 4th, 1884, be and the same is hereby amended as follows, to wit:

1. That the name of said company shall be the Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company.

2. That section 9 of said act be, and the same is hereby amended, so as to read as follows:

Said corporation may issue bonds secured by lien or mortgage on all or any part of its property, rights and franchises, to such an amount as its board of directors may deem proper.

3. Said corporation is hereby authorized and empowered to construct, maintain, and operate railroad tracks, with necessary turnouts and sidings, upon the said bridge and the approaches thereto; but said company shall not own or operate freight cars on its own account nor use its engines for transferring freights across the bridge.

4. The said corporation shall also have power to construct railway track with necessary turnouts and sidings upon, over, along, or across any public streets, roads, alleys, avenues, or through
40 or over any blocks or grounds between such streets for the purpose of making connection with the depots or railroad tracks of any railroad in the city of Covington, within such territorial limits as the city counsel of said city shall prescribe, and to acquire real estate necessary for the approaches of said bridge, connecting railway tracks, turnouts, and sidings, either by purchase or

by condemnation in like manner as is prescribed by law in cases orf railroads and turnpike companies.

5. The said corporation shall also have the power to contract with any railroad company or companies for the use of said bridge, the railway tracks thereon, and the connecting railway tracks, turnouts, and sidings leading -hereto: Provided, however, that before said bridge is open for the passage of cars, the Covington and Cincinnati Elevated Railway Transfer and Bridge Company shall make and publish rates of toll to be charged for the passage of cars and locomotives over said bridge and its connection tracks. Said rates of toll shall be furnished to any railroad company applying for the same, and shall with every change thereof, be printed in large type and posted conspicuously in the office of said company in Covington, Kentucky. The rates of toll so fixed shall apply to all railroads desiring to pass their cars and engines over said bridge, and no contract shall be entered into between said Covington and Cincinnati Elevated Railroad Transfer and Bridge Company and any other company or companies or individuals, for any change to be collected for the passage of cars over said bridge
41 or its connecting tracks or other than the rates of toll so fixed and published. Any contract or rebate or other agreement whereby one railroad shall be secured cheaper rates or toll than other railroads shall be unlawful and shall be held as a discrimination and -he railroad discriminated against shall have the right to recover against Covington and Cincinnati Elevated Railroad Transfer and Bridge Company double the amount of the loss it has sustained by reason of such discrimination, together with its costs and *and* a reasonable attorney's fees to be fixed by the trial court. One or more complaints may be joined in the action, *to* no such action shall be barred by limitation until two years after such discrimination.

6. The said corporation shall also have power to acquire either by purchase or assignment, such right of way over, upon, above, or across any public street or avenue, or through or over any blocks of ground between said streets for the purpose of making connections with depots or railway tracks of any railroad company or companies having a depot in Covington, as may now be possessed or held by any other incorporated company or companies upon such terms and conditions as may be agreed upon with said compan*ies* or companies.

7. The said corporation may consolidate with any company or companies incorporated under the laws of the State of Ohio having for its or their object the construction of a bridge between Covington and Cincinnati, and upon such terms and conditions as may be agreed upon by *the* between said companies, and with such number of directors as the agreement of consolidation may determine, provided that said articles of consolidation shall provide for the
42 construction of a railroad track*s* in the city of Cincinnati connecting said bridge with any line of railway now constructed and being operated in the city of Cincinnati, so that cars and engines may pass from said line or lines of railway over said

bridge into the city of Covington, and that such connection track in the city of Cincinnati shall be perpetually maintained, and that such articles of consolidation shall provide further that any railroad which is now or may *be* hereafter be constructed in the city of Covington, Kentucky, or the city of Cincinnati, in the State of Ohio, shall have the right to use said bridge with its connecting tracks for the passage of cars and locomotives upon the payment of such rates of toll as may be provided.

The said agreement of consolidation shall take effect as soon as a copy thereof duly certified by the president and secretary of each of the consolidatin*f* companies shall have been filed with the secretary of state and a certified copy of such agreement of consolidation from said secretary's office shall constitute legal evidence thereof.

8. The said company shall construct and maintain tracks connecting its bridge with the Kentucky Central railroad in such manner as to enable other railroads to connect their lines of railway with said tracks approaching said bridge. Connections made by any other railroad with such connecting *track* tracks shall be so made as to permit*t* other railroads to connect therewith, and any railroad now existing or to be hereafter constructed within the city of Covington shall have the right to connect its railway with said connecting tracks, and shall have the right to use the same
43 for the purpose of, and to cross said bridge with its locomotives and cars upon the payment of tolls and upon terms in this act expressed.

9. The consolidated company which may be created under section 7 of this act shall be entitled to all the rights, privileges, and franchises conferred by this and the act to which this is an amendment, as well as to the rights, privileges, and franchises held or possessed by the corporation with which such consolidation may be made. Provided, however, that the rights, privileges, and franchises of said consolidated company shall in no way conflict with the constitution of the State of Kentucky or with the general laws of the State now in force or with the provisions of this act; and provided further, that no municipal contribution in any form shall be made by the city of Covington in aid of said bridge, its approaches or connections.

10. The said company shall not have the power to acquire mo-e than one right of way from any depot in Covington to its bridge and shall obtain no permit or privilege from the city councils of Covington for such right of way without first having given at least one week's notice of its intention to make application therefor, which notice shall be in writing and be served on the city clerk of said city and said corporation shall also cause said notice to be published in some newspaper circulated in Covington at least seven days before the making of such application, but nothing herein shall be construed to prevent said company from acquiring a right of way by assignment as provided in section 6 hereof.

11. The said company shall erect, maintain, and operate for-

ever a part of said bridge ways for vehicles and quadrupeds
44 of not less width than those now maintained by the Covington and Cincinnati Suspension Bridge Company, and operate ways for foot passengers, the latter to be not less than five feet in width in the clear, and to be protected by suitable guards or railings seperating same from the ways of quadrupeds and vehicles, and said vehicles and footways shall be forever maintained and kept open to the public. Provided, also, that said bridge company or the Covington and Cincinnati Elevated Railroad Transfer and Bridge Company shall not be consolidated with the Covington and Cincinnati Suspension Bridge Company, nor sell, hire or lease to said Covington and Cincinnati Bridge Company, either the roadways for foot passenger or for vehicles, nor make nor enter into any combination or agreement with said suspension bridge company for a division of toll or other profits, or any other agreement for increasing or maintaining the rate of toll, and the rate of toll upon said roadway shall at no time exceed *in* the rate charged by said Covington and Cincinnati Suspension Bridge upon January 1st, 1886.

12. It shall be the duty of this corporation, in contracting with any railroad now in the city of Covington or hereafter to be built in said city, either for the use of any of its tracks or turnouts or bridge, to provide that such railroad shall have sufficient facilities for receiving, and shall receive and transport freight in any quantities that may be offered to it in said city of Covington, and there shall be no discrimination, in the receiving, shipping, or in charges for freight against the citizens of Covington or any of them, and
any company contracting with this corporation shall be held
45 to have agreed to the stipulations of this section.

13. As soon as this corporation shall commence operations — any of its railroads, tracks, or turnouts in the city of Covington then it shall be its duty to receive freight, as provided in section 12 hereof.

14. Work upon the said structure or improvement contemplated by this act shall be commenced within one year after the passage of this act, and be completed within five years thereafter, otherwise the rights, privileges, and franchises conferred by this act and the act to which this is an amendment shall be forfeited.

15. Said bridge company shall keep on sale to the public coupons, package and communation at both ends of its -ridge continuously from six o'clock a. m. until seven o'clock p. m. daily.

16. Section 19 of the act to which this is an amendment is hereby repealed.

17. In consideration of the exemption from the municipal taxation by the coty *og* Covington, as set forth in section 13 of the act to which this is an amendment, the said company shall charge for all cars transport- across its bridge, connection tracks, turnouts, and sidings, when in complete car-load lots *are* quantities of any kind or class of freight either to or from any single firm, individual, or company doing business in Covington, Kentucky a rate not to exceed ten per cent. less than the published price or rate at which other

cars are transported over said bridge, its connection tracks, turnouts and sidings.

46 18. Whenever this corporation shall lay its tracks upon or over any street, alley, or avenue in said city of Covington, it shall for the same length that such tracks are laid keep in repair the said street, alley, or avenue from curb to curb and should it fail to keep up such repair, then the city council of said city shall cause the same to be done, and the city of Covington, recover the costs thereof from this corporation in any court of competent jurisdiction.

19. This act shall take effect from its passage.

CHAS. OFFUTT,
Speaker of the House of Representatives.
JAMES R. HINDMAN,
Speaker of the Senate.

Approved February 9th, 1886.

J. PROCTOR KNOTT.

By the governor:
J. A. McKENZIE,
Secretary of State,
By H. M. McCARTY,
Assistant Secretary.

47 COMMONWEALTH OF KENTUCKY,
OFFICE OF THE SECRETARY OF STATE.

I, J. A. McKenzie, secretary of state for the Commonwealth aforesaid, do hereby certify that the foregoing writing has been carefully compared by me with the original on file in this office, whereof it purports to be a copy, and that it is a true and exact copy of the same.

*I*t testimony whereof I hereto sign my name and cause my official seal to be affixed. Done at Frankfort this thirteenth day of June, A. D. 1886.

J. A. McKENZIE,
Secretary of State.
[SEAL.] H. M. McCARTY,
Assistant Secretary of State.

48 *Charter of Ohio & Kentucky Bridge Co.*

The Ohio and Kentucky Bridge Company *Company.*

Filed February 8th, 1886.

Articles of Incorporation.

By these articles of incorporation Henry Lewis, M. E. Ingalls, William N. Ramsey, Eugene Zimmerman, and Joseph N. Kinney, all citizens of the State of Ohio, *due* by virtue of the laws of said State incorporate themselves under the name and style of the Ohio and Kentucky Bridge Company, the purpose for the forming of which is to construct and maintain a bridge over the Ohio river

between the cities of Cincinnati, in the State of Ohio and county of Hamilton, and the city of Covington, in the Commonwealth of Kentucky and county of Kenton.

The principal business of said corporation is to be transacted in the said city of Cincinnati, and the amount of its capital stock is to be ten thousand dollars, divided into one hundred shares of the value of $100.00 each.

It witness whereof the said incorporators have hereunto set their hands and seals on this 6th day of February, A. D. ——.

HENRY LEWIS. [L. S.]
M. E. INGALLS. [L. S.]
WM. E. RAMSEY. [L. S.]
EUGENE ZIMMERMAN. [L. S.]
JOSEPH N. KINNEY. [L. S.]

49 *Act of Congress.*

An act to authorize the Covington and Cincinnati Elevated Railway Transfer and Bridge Company to erect a bridge across the Ohio river.

To be enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Covington and Cincinnati Elevated Railway Transfer and Bridge Company, and its successors or assigns, are hereby authorized and empow-ed to erect a bridge across the Ohio river between Covington, Kentucky and Cincinnati, Ohio, subject to the limitations and restrictions of the general law regulating the construction of bridges over the Ohio river: Provided, however, that said bridge shall not be of less elevation than the Covington and Cincinnati suspension bride, and may be constructed without a pivot-draw span.

Approved May 20th, 1886.

50 *Consolidation in Ohio.*

It is hereby certified, that the following is a true and correct copy of an agreement of consolidation entere*n* into between the Ohio and Kentucky Bridge Company, a corporation under the laws of Ohio, and the Covington and Cincinnati Elevated Railroad Transfer and Bridge Company, a corporation under the laws of Kentucky, said agreement having been entered into by the boards of directors of said companies, and duly adopted by the unanimous vote of the stockholders of said company.

Said stockholders' meeting- were held on the thirteenth day of February, A. D. 1886, and were each attended by all the stockholders of each of said companies, after due notice, at which said meeting- said agreement was duly adopted by unanimous — as aforesaid. Said agreement is as follows:

Articles of Consolidation.

Know all men by these presents, that the Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company, a

corporation under the laws of Kentucky, and the Ohio and Kentucky Bridge Company a corporation under the laws of Ohio, are hereby consolidated and formed into one company, under and by virtue of the authority of the charter of each of said companies, upon the following terms and conditions, to wit:

First. That said consolidated company shall be known as the Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company.

Socond. The said company shall be governed, and its business conducted by a board of directors composed of nine persons,
51 three of whom shall be residents of Kentucky, *tow* of Ohio, and four of New York.

Third. The capital of the said company shall be the sum of $1,000,000.00 divided into shares of $100 each with power in the board of directors to increase the stock to $1,500,000.

The owners of existing shares of capital stock of both of the constituent companies shall be entitled to exchange said shares for corresponding amounts of the stock of the consolidated company, and holders of ths stock of either of said companies declining to make such exchange shall receive the value of their shares in money such value to be fixed by agreement or otherwise in the manner prescribed by section 3388, Revised Statutes of Ohio.

Fourth. All the property of every description, and all franchises and all contracts and agreements and other things of value belonging to each of the constituent companies, shall belong to the consolidated company, and all liabilities of each of said companies, shall be assumed by the new company.

Fifth. All meetings of the stockholders of said consolidated company shall be held at the office of said company in Covington, Ky., but meetings of the directors may be held either at the office of the company at Covington or at its office, in Cincinnati, Ohio.

The time of the meeting may be fixed by the by-laws of said consolidated company. *The* members of the board of directors shall constitute a quorum for the transaction of business. The number of directors may be increased by the stockholders of said consolidated company.

52 Sixth. Nothing in this agreement shall be construed to be in conflict with or inconsistent with any of the provisions of the charter of either of said consolidated companies, but all of the provisions of said charter are to be kept in full force and rigor, except as herein modified in pursuance of express authority of law.

Said consolidated company shall comply with all the requirements of section 7 of the act amending the act of April 4th, 1884, incorporating the said Kentucky company and especially as to construction, maintenance and use of railroad tracts in the city of Cincinnati connecting said bridge with an existing railroad in said city and all of said section is adopted as is fully set forth herein.

Done this twelfth day of February, A. D. 1886, by the directors of each of said constituent companies, in pursuance of resolutions of the board of directors of each of said companies and of resolution adopted at meetings of the stockholders of each of said companies.

In witness whereof, the said The Covington and Cincinnaty Elevated Railroad and Transfer and Bridge Company and the said The Ohio and Kentucky Bridge Company by their respective presidents and secretaries, have hereunto set their respective corporate names and corporate seals on the day and year aforesaid.

(Signed) THE OHIO AND KENTUCKY BRIDGE COMPANY,
By HENRY LEWIS, *Its President.*

J. N. KINNEY, *Secretary.*

THE COVINGTON AND CINCINNATI ELEVATED RAILROAD AND TRANSFER & BRIDGE COMPANY,
53 By E. ZIMMERMAN, *President.*

G. W. GREENE, *Secretary.*

In witness whereof we have hereunto set our respective hands this twenty-seventh day of July, A. D. 1886.

E. ZIMMERMAN,
President of the Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company.
HENRY LEWIS,
President of the Ohio and Kentucky Bridge Company.
MORTIMER MATTHEWS,
Secretary of the Ohio and Kentucky Bridge Co.

STATE OF OHIO, } ss:
Hamilton County, }

Personally appeared before me, a notary public in and for said county, Eugene Zimmerman and Wm. H. Ramsey, who, being by me duly sworn, state that they were present at the making of the agreement of consolidation between the Ohio and Kentucky Bridge Company and the Covington and Cincinnati Elevated *and* Railroad and Transfer and Bridge Company on the 12th day of February, 1886; that said agreement was unanimously adopted by the board of directors of each company and by all of the stockholders of each company, and was duly signed by the presidents and secretaries of each company, and that a true copy of said agreement thus signed by said officers was duly entered in the record book of the said The Ohio and Kentucky Bridge Company at pages 10, 11, 12, and 13.

54 Further affiant- say not.

EUGENE ZIMMERMAN.
WM. M. RAMSEY.

Sworn to before me and subscribed in my presence this 27th day of July, A. D. 1886.

[NOTARIAL SEAL.] ROBERT RAMSEY,
Notary Public, Hamilton County, Ohio.

COMMONWEALTH OF KENTUCKY,
OFFICE OF THE SECRETARY OF STATE,
FRANKFORT, *July* 28, 1886.

The foregoing affidavit was this day filed in the office of the secretary of the State for this Commonwealth in connection with the certified copy of an agreement of consolidation entered into between the Ohio and Kentucky Bridge Company and the Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company.

J. A. McKENZIE,
Secretary of State,
By H. M. McCARTY,
Assistant Secretary.

COMMONWEALTH OF KENTUCKY,
OFFICE OF THE SECRETARY OF STATE.

I, J. A. McKenzie, secretary of state for the Commonwealth aforesaid, do hereby certify that the foregoing instrument has been carefully compared by me with the original on file in this office, whereof it purports to be a copy, and that it is a true copy and exact copy of the same.

In testimony whereof I hereunto sign my name and cause
55 an impression of my official seal to be affixed, at Frankfort, this 28th day of July, A. D. 1886.

[SEAL.]

J. A. McKENZIE,
Secretary of State,
By H. M. McCARTY,
Assistant Secretary.

UNITED STATES OF AMERICA, }
Ohio. }

OFFICE OF THE SECRETARY OF STATE.

I, James S. Robinson, secretary of state of the State of Ohio, having the custody of the great seal of the said State, do hereby certify that the annexed instrument is a true copy of agreement of consolidation of the Covington & Cincinnati Elevated Railroad and Transfer and Bridge Company with the Ohio and Kentucky Bridge Company, under the name of the Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company, together with the certificate of the filing of the original in the office of the secretary of state of the State of Kentucky. Filed in this office on the 2nd of August, A. D. 1886, and recorded in volume 35, page 520, of the Records of Incorporations.

In testimony whereof I have hereunto subscribed my name and affixed the great seal of the State of Ohio, at Columbus, the third day of August, A. D. 1886.

[SEAL.]

J. S. ROBINSON,
Secretary of State.

Consolidation in Kentucky.

It is hereby certified that the following is a true and correct copy of an agreement of consolidation entered into between the
56 Ohio and Kentucky Bridge Company, a corporation under the laws of Ohio, and the Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company, a corporation under the laws of Kentucky, said agreement having been entered into by the boards of directors of said company and duly adopted by the unanimous vote of the stockholders of said companies. Said stockholders' meetings were held on the 13th day of February, A. D. 1886, and were each attended by all of the stockholders of each of said company after due notice, at which said meeting said agreement was duly adopted by a unanimous vote as aforesaid. Said agreement is as follows:

Articles of Consolidation.

Know all men by these presents, that the Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company, a corporation under the laws of Kentucky and the Ohio and Kentucky Bridge Company a corporation under the laws of Ohio are hereby consolidated and formed into one company, under and by virtue of the authority of the charter of each of said companies, upon the following terms and conditions, to wit:

First. The said consolidated company shall be known as the Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company.

Second. The said company shall be governed and its business conducted by a board of directors composed of nine persons, three of whom shall be residents of Kentucky, two of Ohio and four of New York.

Third. The capital stock of the said company shall be the sum of $1,000,000.00, divided into shares of $100 each with power in the board of directors to increase the stock to $1,500,000.00. The
57 owners of existing shares of capital stock of both of the constituent companies shall be entitled to exchange said shares for corresponding amounts of the stock of the consolidated company, and holders of the stock of either of said companies declining to make such exchange shall receive the value of their shares in money, such value to be fixed by agreement, or otherwise, in the manner prescribed by section 3388 Revised Statutes of Ohio.

Fourth. All the property of every description and all franchises and all contracts and agreements and other things of value belonging to each of the constituent companies shall belong to the consolidated company and all liabilities of each of said company shall be assumed by the new company.

Fifth. All meetings of the stockholders of said consolidated company shall be held at the office of said company in Covington, Ky., but meetings of the directors may be held either at the office of

the company in Covington or at its office in Cincinnati, O. The times of meetings may be fixed by by-laws of said consolidated company. Five members of the board of directors shall constitute a quorum for the transaction of business. The number of directors may be increased by the stockholders of said consolidated company.

Sixth. Nothing in this agreement shall be construed to be in conflict with or inconsistent with any of the provisions of the charter of either of said consolidated companies, but all of the provisions of said charter are to be kept in full force and vigor, except as herein modified in pursuance of expressed authority of law.

58 Said consolidated company shall comply with all the requirements of section 7 of the act amending the act of April 4, 1884, incorporating the said Kentucky company, and especially as to construction, maintenance, and use of railroad tracks in the city of Cincinnati, connecting said bridge with an existing railroad in this city; and all of said section is adopted as if fully set forth herein.

Done this 12th day of February, A. D. 1886, by the directors of each of said constituent companies in pursuance of resolutions of the board of directors of each of said companies and of resolutions adopted at meetings of the stockholders of each of said companies.

In witness whereof the said The Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company and the said The Ohio and Kentucky Bridge Company by their respective presidents and secretaries have hereunto set their respective corporate names and corporate seals on the day and year last aforesaid.

(Signed) THE OHIO AND KENTUCKY BRIDGE COMPANY,
By HENRY M. LEWIS, *Its President.*

J. N. KINNEY, *Secretary.*

THE COVINGTON AND CINCINNATI ELEVATED RAILROAD AND TRANSFER AND BRIDGE COMPANY,
By E. ZIMMERMAN, *President.*

G. W. GREENE, *Secretary.*

In witness whereof we have hereunto set our respective hands this 27th day of July, A. D. 1886.

E. ZIMMERMAN,
President of the Covington and Cincinnati Elevated
59 *Railroad and Transfer and Bridge Company.*
HENRY LEWIS,
President of the Ohio and Kentucky Bridge Co.
MORTIMER MATTHEWS,
Secretary of the Ohio and Kentucky Bridge Company.

COMMONWEALTH OF KENTUCKY,
OFFICE OF SECRETARY OF STATE,
FRANKFORT, *July* 28, 1886.

The foregoing certificate duly made under the provisions of the 7th section of "An act to amend an act entitled 'An act to incorporate the Covington and Cincinnati Pier Bridge Company,' approved April 4, 1884," approved February 9, 1886, has this day been filed with the secretary of state of this Commonwealth for record.

J. A. McKENZIE,
Secretary of State,
By H. M. McCARTY,
Assist. Secretary.

COMMONWEALTH OF KENTUCKY,
OFFICE OF THE SECRETARY OF STATE.

I, J. A. McKenzie, secretary of state for the Commonwealth aforesaid, do hereby certify that the foregoing is a true and correct copy of the agreement of consolidation between the Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company and the Ohio and Kentucky Bridge Company, as the same appears of record in this office on pages 264–267 of record book entitled "Railroad Equipment, &c., Record."

In testimony whereof I have caused an impression of my
60 official seal to be affixed at Frankfort this 29th day of July, A. D. 1886.

[L. S.]

J. A. McKENZIE,
Secretary of State,
By H. M. McCARTY,
Assistant Secretary.

61 *Objection to Testimony.*

To the reading of said affidavit the Commonwealth objected for relevancy and competency as to matters therein stated, but not for or on account of form, and the court overruled said objection; to which ruling the Commonwealth excepted; and this was all the evidence introduced by the Commonwealth and by the defendant, and this was all the evidence introduced in the case.

And thereupon, arguments of counsel having been heard, the court order- the following finding, judgment, and order:

(See page 30.)

To which the defendant then excepted and still excepts.

And thereupon on the 27th day of Sept., 1893, the defendant filed its motion and grounds for setting aside the finding, verdict, ruling, and judgment for granting a new trial. Said motion and grounds are as follows:

(See page 31.)

The defend-, The Covington and Cincinnati Elevated Railroad & Transfer & Bridge Company, in and under indictment No. 3914, filed in the Kenton criminal court, now the Kenton circuit court, by the

Commonwealth of Kentucky on May 9, 1890, moved this court to set aside its rulings, finding, and verdict herein and grant it a new trial upon and for the following grounds and reasons:

(See page 31.)

The court overruled defendant's motion for a new trial; to which the defendant then excepted and still excepts.

(See page 32.)

The defendant then tendered its bill of exceptions and evidence, and the same was signed by the judge and made part of the
62 report.

Thereupon, on the 27th day of Sept., 1893, the defendant prayed an appeal to the court of appeals, which was granted.

GEORGE G. PERKINS.

Thereafter, at the same court, on the same day, September 27, 1893—

Appeal.

"The defendant prays an appeal to the court of appeals, which is granted."

On September 30, 1893, the defendant filed the following supersedeas bond:

Supersedeas Bond.

We undertake that the defendant will pay to the Commonwealth all costs and damages that shall be adjudged against said defendant on the appeal from the judgment of said court rendered September 27, 1893, for $1,000 and costs; also that said defendant will satisfy and perform the said judgment appealed from, if affirmed, and any judgment or order which the court passing upon said appeal may render or order to be rendered by the inferior court, not exceeding in amount or value the said judgment appealed from.

Witness our hands this September 30, 1893.

F. A. PRAGUE.

Attest: H. C. HALLAM, *Clerk*,
By H. K. CONNOLLY, *D. C.*

Thereupon the following supersedeas issued:
63 *Thereupon the following supersedeas issued:*

Supersedeas.

THE COMMONWEALTH OF KENTUCKY:

To all whom it may concern:

The defendant having appealed from a judgment of this court rendered September 27, 1893, in favor of the plaintiff against said defendant for $1,000 and costs, and a supersedeas bond having been duly executed by the said appellant, the said appellee and all other persons are directed to stay all proceedings upon said judgment.

Witness H. C. Hallam, clerk of said court, this 30th day of September, 1893.

H. C. HALLAM, *Clerk.*

Kenton Circuit Court.

I, H. C. Hallam, clerk of said court, certify that this and the preceding 62 pages contain a complete and true transcript of the record in the cause named in the caption.

Witness my hand this 30th day of September, 1893.

H. C. HALLAM, *Clerk*,
By H. K. CONNOLLY, *D. C.*

Appellant filed with said transcript and endorsed thereon the following statement:

Statement.

Kentucky Court of Appeals.

THE COVINGTON AND CINCINNATI ELEVATED RAILROAD AND TRANSFER AND BRIDGE COMPANY, Appellant,
64 *vs.*
THE COMMONWEALTH OF KENTUCKY, Appellee. } Statement.

This is an appeal from the judgment of the Kenton circuit court rendered on September 27th, 1893, and found on page 30 of this record. The appeal was granted by the court below and no process is required.

W. H. JACKSON,
Att'y for Appellant.

At a court of appeals held in and for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 3d of October, 1893, the following order was made, to wit:

Order to Docket & Submit.

COVINGTON & CINCINNATI ELEVATED Railroad and Transfer and Bridge Company, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee. } Appeal from the Kenton Circuit Court.

On motion of appellant and by consent, this case is ordered to be docketed and submitted, and, the court being sufficiently advised, it seems to them there is no error in the judgment herein.

Judgment.

It is, therefore, considered that said judgment be affirmed and that appellee recover of appellant ten per cent. damages on the amount of the judgment superseded herein, which is ordered to be certified to said court.

It is further considered that appellee recover of appellant its cost herein.

65 On motion of the appellant, it is ordered that the following certificate be spread upon the record:

Certificate.

Court of Appeals of Kentucky.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE COVINGTON & CINCINNATI ELEVATED Railroad & Transfer & Bridge Company, Defendant.
} Certificate of Federal Questions Involved.

It is hereby certified that this cause involved the consideration and decision of the following Federal questions, to wit:

1. Whether the acts of the General Assembly of the State of Kentucky passed March 31st, 1890, and approved April 9, 1890, were in violation of paragraph 1, section 10, article 1, of the Constitution of the United States, which prohibits the enactment of laws impairing the obligation of contracts.

2. Whether said statutes of Kentucky were in violation of section 8, article 1, of the Constitution of the United States, which vests in Congress the power of regulating commerce among the States.

3. Whether the said statutes of Kentucky were in violation of section 1, article 14, of the Constitution of the United States, which forbids the taking of private property without due process of law.

4. The court further certifies that it was claimed by the
66 defendant, The Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company, that the said statutes were in violation of the Constitution of the United States in the several particulars above set forth—that is to say:

1. That they impaired the obligation of a contract between the State of Kentucky and the said company touching the regulation of the rates of fare upon that portion of said company's bridge devoted to the use of footways and wagon-ways.

2. That they were in violation of said section 8, article 1, of the Constitution of the United States as being a regulation of commerce between the States of Ohio and Kentucky.

3. That *it was* in violation of said section 1, article 14, of the Constitution of the United States, inasmuch as *it* reduced the rates of toll applying to the footways and wagon-ways of said bridge to such an extent as that no return would be yielded to said company for the use and maintenance of that portion of its said bridge, and that said property would be confiscated.

All said questions were decided against said Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company and were necessary to the determination of the cause against the said Covington & Cincinnati Elevated Railroad and Transfer and Bridge Company.

In witness whereof I have hereunto set my hand and the seal of this court this 3 day of October, 1893.

C. BENNETT,
Chief Justice of the Kentucky Court of Appeals.

67 At the same time, October 3, 1893, the court, through Judge Pryor, delivered the following opinion herein:

Opinion.

Kentucky Court of Appeals.

THE COVINGTON & CINCINNATI ELEvated Railroad & Transfer & Bridge Co., Appellant,
vs.
COMMONWEALTH OF KY., Appellee.
} Appeal from the Kenton Circuit Court.

The opinion delivered in this case at a former hearing determined the constitutionality of the act of the legislature reducing the tolls on appellee's bridge. This is the only question involved in the present appeal, and, having heretofore adjudged the act constitutional, we perceive no reason for disturbing the judgment below, and the same is now affirmed.

W. H. Jackson, for appellant.

On the 11th day of October, 1893, the appellant and plaintiff in error filed in the office of the clerk of the Kentucky court of appeals a copy of its writ of error, the original of which here follows:

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of appeals of the State of Kentucky, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company, appellant, and The Commonwealth of Kentucky, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
69 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by its com-

plaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the ninth day of October, in the year of our Lord one thousand eight hundred and ninety-three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

70 On the 11th day of October, 1893, the plaintiff in error filed in the office of the clerk of the court of appeals the following bond:

Know all men by these presents that we, The Covington & Cincinnati Elevated Railroad and Transfer and Bridge Company, as principal, and ——— ———, as sureties, are held and firmly bound unto the Commonwealth of Kentucky in the full and just sum of fifteen hundred dollars ($1,500), to be paid to the said Commonwealth of Kentucky, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of October, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a court of appeals of the State of Kentucky, in a suit depending in said court between The Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company, appellant, and The Commonwealth of Kentucky, appellee, a judgment was rendered against the said appellant, and the said appellant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said appellant, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said appellant shall prosecute said writ to effect and answer all damages

and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE COVINGTON AND CINCINNATI ELEVATED RAILROAD AND TRANSFER AND BRIDGE CO.,
By W. H. JACKSON, *Its Att'y.* [SEAL.]
71 F. A. PRAGUE,
By W. H. JACKSON, *His Att'y-in-fact.* [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by associate justice Supreme Court U. S.

Power of Attorney.

Know all men by these presents that I, F. A. Prague, of Covington, Ky., do hereby appoint and constitute W. H. Jackson, of Cincinnati, O., my agent and attorney-in-fact to execute for me and in my name, as surety, such bond as may be required in the Supreme Court of the United States for issuing a writ of error and citation in the case of Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company *vs.* The Commonwealth of Kentucky.

F. A. PRAGUE.

Subscribed in my presence and acknowledged before me this 4th day of October, 1893.

J. M. MAHON,
Notary Public, Kenton Co., Ky.

72 COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, certify in accordance with the writ of error herein, returned herewith, a copy of which is on file in my office, that the preceding seventy-one pages contain a true, full, and complete transcript of the record and proceedings had in the said court of appeals in the case of Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company, appellant, against The Commonwealth of Kentucky, appellee, on appeal from the Kenton circuit court, together with a copy of the supersedeas bond, the original of which is on file in my office, as appears of record and on file in my said office.

Seal Kentucky Court of Appeals.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 12th day of October, A. D. 1893.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $28.50.

73 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein The Covington & Cincinnati Elevated Railroad and Transfer and Bridge Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this ninth day of October, in the year of our Lord one thousand eight hundred and ninety-three.

HENRY B. BROWN,
Associate Justice Sup. Court U. S.

74 On this 12th day of October, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared G. H. Greene before me, the subscriber, a notary public for Franklin county, State of Kentucky, and makes oath that he delivered a true copy of the within citation to W. J. Hendrick, attorney general of Kentucky, and John Young Brown, governor of Kentucky.

G. H. GREENE.

Sworn to and subscribed the 12 day of Oct., A. D. 1893.

[Seal of S. Hannah Innes, Notary Public, Franklin Co., Ky.]

S. HANNAH INNES, *N. P., F. C.*

Endorsed on cover: Case No. 15,427. Kentucky court of appeals. Term No., 1043. The Covington & Cincinnati Elevated Railroad & Transfer and Bridge Company, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed October 18th, 1893.

Supreme Court of the United States.

OCTOBER TERM, 1898. NO. 1048.

The Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company,

Plaintiff in Error,

vs.

The Commonwealth of Kentucky,

Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

By WM. H. JACKSON,
W. H. WADSWORTH.

Supreme Court of the United States.

OCTOBER TERM, 1893. NO. 1043.

The Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company,

Plaintiff in Error.

vs.

The Commonwealth of Kentucky,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

By WM. H. JACKSON,
W. H. WADSWORTH.

Statement of the Facts of the Case.

The legislature of Kentucky, by an act approved February 9, 1886, amending an act entitled an act to incorporate the Covington and Cincinnati Pier Bridge Company, passed April 4, 1884, authorized the company, under the name of the Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company, to construct, maintain, and operate railroad tracks, with necessary turnouts and sidings, over the bridge authorized by the original charter, from the depots or railway tracks of any railroad in the City of Covington; and was invested with the usual powers and privileges in such cases.

February 8, 1886, "The Ohio and Kentucky Bridge Company" was organized, under the general law of Ohio, for the purpose of constructing and maintaining a bridge

over the Ohio river between the City of Cincinnati, in the State of Ohio and county of Hamilton, and the City of Covington, in the *Commonwealth* of Kentucky, and county of Kenton.

On the 13th day of February, 1886, said companies were duly and legally consolidated under and by virtue of the powers derived by each from the state creating it.

The Kentucky corporation was allowed to consolidate with the Ohio corporation, provided the articles of consolidation should provide for the construction of railroad tracks in the City of Cincinnati connecting the bridge across the Ohio river, which was to be erected, with any line of railway constructed and operated in said city, so that cars and engines might pass from such line or lines of railway over said bridge into the City of Covington, said connection to be perpetually maintained; and provided further that railroads already in operation in the City of Covington, or which might afterward be constructed in the City of Covington, or the City of Cincinnati, should have the right to use said bridge, with all its connecting tracks, for the passage of cars and locomotives upon the payment of such rates of toll as might be provided. (Sec. 7 of the said amended act.) Said company was also bound and obliged by the Kentucky act to maintain railway tracks connecting its bridge with the Kentucky Central Railroad, so as to enable other railroads to connect their lines of railway with said tracks approaching the bridge, and connections made by other railroads were to be so arranged as to permit any other railroads to connect therewith.

The company was empowered to make and publish a schedule of tolls to be charged railroads for the passage of their trains over the railroad and bridge. It was also obliged to construct, maintain, and operate *forever* a part of the bridge ways for vehicles and quadrupeds, and ways for foot passengers, of a width of not less than five feet in the clear, protected by guards and railings separating same from the ways of quadrupeds; which were to be forever maintained and kept open to the public. The company was authorized to charge a rate of toll upon said roadways,

not exceeding the rate charged by the Covington and Cincinnati Suspension Bridge Company upon January 1, 1886. (Sec. 11 of said act. Rec., p. 25.)

The consolidated company was invested with all the rights, privileges, and franchises conferred on the Kentucky corporation by the several acts creating it, and with all the rights, privileges, and franchises held and possessed by the Ohio corporation. (Sec. 9 of said amendment.) On May 20, 1886, Congress passed an act authorizing this Bridge Company to construct its bridge across the Ohio river.

Under the consolidated authority, and pursuant to act of Congress, plaintiff in error constructed its lines of railway from the lines and depots in Covington to the Union Depot, in Cincinnati, with proper turnouts, sidings, and terminal facilities, over an iron bridge spanning the Ohio, with proper roadways and foot passenger ways, all at a cost of over three millions of dollars.

The foot passenger and vehicle roadways were opened to the public the 2d of September, 1889, under a schedule of charges not exceeding the rates charged on 1st of January, 1886, by the said Covington and Cincinnati Suspension Bridge Company.

The franchises, rights, privileges, and property of plaintiff in error, under authority derived from the acts of incorporation, were mortgaged to secure a bonded indebtedness of $3,500,000; the bonds being in circulation and unpaid, and the proceeds expended in the construction of the railroad and bridge prior to the passage of the acts in question.

Of this sum $600,000 were expended in the construction and preparation of the said foot passenger and roadway attachment.

The gross earnings of this portion of the property, from September 2, 1889, to April 30, 1890 (inclusive), were $22,125.39; the expenses of operating and maintaining, not including any thing for repairs, were $12,185.91; the interest on the cost of this portion of the property ($600,000) at 5 per cent for the same period was $20,000.00, leaving a deficit of $10,060.52 from the operations for eight months.

On the 9th April, 1890, the general law, and the amendment to the charter of plaintiff in error, passed by the Kentucky legislature, were approved, both making the same classifications of the business over said foot passenger and roadways, and the same reduction in the charges adopted by plaintiff in error for the use of that portion of the property. The amendment to the charter of plaintiff in error is in words, as follows, to wit:

[Chapter 670.]

AN ACT to amend an act, approved February ninth, one thousand eight hundred and eighty-six, and entitled "An act to amend an act entitled 'An act to incorporate the Covington and Cincinnati Pier Bridge Company,' passed April fourth, one thousand eight hundred and eighty-four."

SECTION 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That an act approved February ninth, one thousand eight hundred and eighty-six, which is entitled "An act to amend an act entitled 'An act to incorporate the Covington and Cincinnati Pier Bridge Company,' passed April fourth, one thousand eight hundred and eighty-four," be, and the same is, amended to the effect following, to wit: It shall be unlawful for any person or corporation to charge, collect, demand, or receive, for passage over the foot-ways or wagon-ways of the bridge spanning the Ohio river, which has been constructed under the acts mentioned in the title of this act, any toll, fare, compensation, reward, or thing of value whatever, greater than, or in excess of, the following rates, to wit: For persons passing over said bridge on foot, one cent for a single crossing, or twenty-five crossings for twenty cents; for vehicles drawn by one horse, eight cents for a single crossing, or eight crossings for fifty cents, or sixteen crossings for one dollar; for vehicles drawn by two horses, twelve cents for a single crossing, or six crossings for fifty cents, or twelve crossings for one dollar; for vehicles drawn by three horses, fifteen cents for a single crossing, or ten crossings for one dollar; for vehicles drawn by four horses, eighteen cents for a single crossing, or eight crossings for

one dollar; for vehicles drawn by more than four horses, three cents for every horse more than four; for vehicles drawn or driven by other than animal power, the same toll charged for vehicles drawn by two horses; for horse with rider, five cents; for timber wheels drawn by two horses, fifteen cents; for timber wheels drawn by four horses, twenty-five cents; for timber wheels drawn by six horses, thirty-five cents; for cattle, horses, or mules, per head, five cents; for hogs or sheep, per head, two cents; for loads weighing ten tons or more, fifty cents; for vehicles in tow, the same toll charged for vehicles drawn by one horse.

SECTION 2. The corporation created by the acts mentioned in the title of this act, and every person or corporation possessing, owning, controlling, or operating said bridge shall sell to all applicants therefor, in quantities desired by the applicants, tickets for passage over said bridge, according to the divisions, classifications, and at not greater rates than the maximum rates fixed in the first section of this act; and such tickets shall entitle the holder to passage either way over said bridge at rates not greater than, nor more than, those fixed in the first section of this act.

SECTION 3. The corporation created by the acts mentioned in the title of this act, and every person or corporation owning, controlling, possessing, or operating said bridge, shall have and keep at said bridge, within the county of Kenton, and the Commonwealth of Kentucky, an office, and there have continuously on sale, between the hours of six o'clock ante meridian, and eight o'clock post meridian, of each and every day, the tickets provided for in the second section of this act; and shall, at such office, keep conspicuously posted a schedule of the tolls that may be fixed in pursuance of the provisions of this act.

SECTION 4. Every violation of, or failure to comply with, any provision or requirement of this act, shall subject the corporation or person so offending to a fine of not less than one hundred dollars and not more than one thousand dollars, to be recoverable by the Commonwealth of

Kentucky by indictment in any court of competent jurisdiction.

SECTION 5. Any summons, writ, legal process, or notice against or to the corporation created by the acts mentioned in the title of this act, or against or to any corporation possessing, owning, controlling, or operating said bridge, may be served or executed by being delivered to any officer, director, toll-gatherer, or ticket-seller of such corporation.

SECTION 6. Nothing contained in this act shall operate as a waiver or relinquishment of any forfeiture, or ground or cause for forfeiture, of any right, power, or franchise that may have been incurred by the corporation created by the acts mentioned in the title of this act.

SECTION 7. This act shall be in force from its passage.

HARVEY MEYERS,
Speaker House of Representatives.
D. H. SMITH,
Pro Tem. Speaker of the Senate.

Approved April 9, 1890.
S. B. BUCKNER.
By the Governor.
GEO. M. ADAMS,
Secretary of State.

COMMONWEALTH OF KENTUCKY,
OFFICE OF SECRETARY OF STATE.

I, John W. Headley, secretary of state for the commonwealth aforesaid, do hereby certify that the foregoing writing has been carefully compared by me with the original on file in this office, whereof it purports to be a copy, and that it is a true and exact copy of the same.

In testimony whereof, I hereto sign my name, and cause my official seal to be affixed. Done at Frankfort, this 14th day of November, A. D. 1893.

JOHN W. HEADLEY,
Secretary of State.
[SEAL.]
By EDW. O. LEIGH,
Assistant Secretary of State.

And the general law is in language and effect the same.

The reductions, in the aggregate, are more than one-half, as appears from the agreed statement of facts in the affidavit of the treasurer of plaintiff in error. He states that, applying the reduced rates to the business reported for eight months, the above deficit would amount to $21,493.54, and that the receipts would have been less than the operating expenses, leaving interest and repairs without a dividend. (Rec., pp. 19–21.)

On the 9th of May, 1890, plaintiff in error was indicted in the Criminal Court by the grand jury of Kenton county for violations of the acts in question. (Rec., pp. 1, 2.)

The case was submitted to the judge, law and fact, upon a demurrer by plaintiff in error, and agreed facts. (Rec., p. 3.)

On the 17th of May, the judge of the Criminal Court rendered a written decision, dismissing the indictment and discharging plaintiff in error. (Rec., pp. 3–6.)

The Commonwealth filed grounds and moved for a new trial, but the motion was overruled, and the case was taken by appeal to the Court of Appeals of the State of Kentucky, and upon hearing, the judgment of the lower court was, on June 10, 1893, reversed. (Rec., pp. 7–16.)

The case was remanded to the Kenton Circuit Court, and the demurrer of plaintiff in error was overruled, and plaintiff in error filed its second demurrer, which was also overruled (Rec., pp. 16, 17); and thereafter, on the 27th day of September, 1893, by agreement, the law and facts as agreed upon (Rec. pp. 19–33) were submitted to the court (Rec., p. 17), and on the same day the court rendered a judgment for a fine against plaintiff in error for $1,000 and costs of proceeding (Rec., p. 17); and plaintiff in error, after making the preliminary motions in the lower court, prosecuted an appeal from said judgment to the Court of Appeals of Kentucky, where the same was affirmed, and final judgment rendered against plaintiff in error for $1,000 and ten per cent penalty and all costs.

The record therefore presents the questions:

First. The right of the state, in the absence of congressional legislation on the subject, to prescribe the rates to be charged for the use of and the classification and arrangement of business over a highway or bridge situated in two states, and to regulate as to the rates charged, and as to such classification and arrangement of business, the trade or travel over such bridge from either shore; that is, from the Ohio to the Kentucky, as well as from the Kentucky to the Ohio shore.

Second. The right of a state, by reason of a pre-existing legislative reservation of a right to alter or repeal charters of incorporation, to change, without the consent of the company, that part of its charter which prescribes a certain maximum rate of tolls.

Third. The absolute right of a state, by its legislature, to so reduce the charges or fares of a corporation engaged in business of a public nature, as that the revenue derived will not be sufficient to pay the operating expenses, and to yield any dividend or return on the capital invested in the enterprise; involving the question of the right of the courts to inquire into the reasonableness of the charges so prescribed in each case.

Plaintiff in error complains of prejudicial errors in the rulings and judgments of the Court of Appeals of the State of Kentucky, in that said Court erred in affirming the judgment of Kenton Circuit Court, and in rendering judgment against plaintiff in error for a fine of $1,000 and ten per cent damages, for the reason that, in the determination of said cause, and in rendering the judgment of affirmance, and judgment for penalty, it was necessary to and the court did sustain the validity of the acts of April 9, 1890, and thereby upheld the right of a state as to all three of the questions presented in the record, and denied that the Constitution of the United States was violated in any of these respects. (Rec. p. 36.)

For the purpose of this discussion we will consider singly our first objection, and our second and third objections together. We therefore rely upon the following

Assignment of Errors.

First.—The act in relation to bridges spanning the Ohio river from points in Kenton county, Kentucky, to Ohio, and the act amending the charter of plaintiff in error, passed by the legislature of Kentucky, approved April 9, 1890, are regulations of commerce among the states, not local, but admitting of and requiring one uniform system of regulations, which no state has power to establish, even in the absence of congressional legislation on the subject, and are, for this reason, in violation of article 1, section 8, of the Constitution of the United States, and are therefore void.

Second.—The acts in question are unreasonable, unjust, and oppressive, and impair rights of property which had vested previous to their passage, and for these reasons are in conflict with the Constitution of the United States as depriving plaintiff in error of its property without due process of law, and as denying to it the equal protection of the laws; and being in conflict with the proviso to the general law of Kentucky, reserving the power to amend the charter of plaintiff in error, violates the contract clause of the Federal Constitution as well as the Bill of Rights contained in the Kentucky State Constitution.

I.

The act in relation to bridges spanning the Ohio river from points in Kenton county, Kentucky, to Ohio, and the act amending the charter of plaintiff in error, passed by the legislature of Kentucky, approved April 9, 1890, are regulations of commerce among the states, not local, but admitting of and requiring one uniform system of regulations which no state has power to establish, even in the absence of congressional legislation on the subject, and are for this reason in violation of article 1, section 8, of the Constitution of the United States, and are therefore void.

The acts in question assert the power of the legislature of Kentucky to regulate the trade and travel across the Ohio river, both ways to and from all points within the

limits of Kenton county which is or may be carried on by means of bridges, and across the bridge of plaintiff in error, and to effectuate this purpose declares acts which may be lawfully done in the State of Ohio, illegal, and attempts to punish the same by fines and forfeitures.

It is obvious that the State of Ohio possesses just as much legislative authority as the State of Kentucky to regulate the trade and travel across that river both ways over the bridge of plaintiff in error, and by bridges from all points within the county of Hamilton to the county of Kenton; to declare acts done in the State of Kentucky illegal, and attempt to punish them in the same or any other way.

It would seem to be too plain for argument that neither of those highly respected states possesses the power, separately, to establish the bridge or bridges, or to regulate that trade and travel, or give any extra-territorial force to its laws. Neither of them can provide, by its separate legislation, that uniform system for conducting this exclusively interstate commerce, by which, only, it is possible to carry on by any use of the bridges now erected across, or which may hereafter span, that river.

Neither can those states by any contract or treaty between *them* establish such a uniformity of regulation, since they are without power to enter into any such leagues.

Neither can cede to the other any portion of its legislative power or jurisdiction over persons or property within its territory.

Each may incorporate a bridge or other company and empower it to do business in other states, or to consolidate with corporations created by any other state, but the consolidated company will be a citizen of each state, and its property and business subject to the lawful authority and control of each state so far as within its territory.

Muller v. *Dows*, 94 U. S. 444.

Graham v. *Boston H. & E. R. R. Co.*, 118 Ib. 168.

But such control can have no extra territorial reach, nor can it invade the domain of federal power.

The plaintiff in error, the Covington and Cincinnati Elevated Railway, etc., Company, has erected its bridge across the Ohio river, laid down its railway tracks across it from the depot and lines of railroad in the City of Covington, on the Kentucky side of the river, to a union depot of railroads in the City of Cincinnati, on the Ohio side, with proper terminal facilities, under charter authority from both states, derived as much from one as the other, and with the grant of the same powers, rights, and privileges from each. Under the consolidated authority of both states, the Elevated Railway, etc., Company may, as it is authorized by its charter to do, adopt a uniform system of regulations applicable to both sides of the river for the conduct of the commerce over its railway and the foot-bridge, etc., attachment; but neither state can make any change in this authorized system and give it force and effect by its own proper will beyond its own territory. Any legislative regulation must come from Congress, for it alone can establish a uniform system, and separate state action is invalid unless Congress has assented to or ratified the same.

It may be contended that Congress, by the act authorizing the Elevated Railway, etc., Company, its successors and assigns, to erect the bridge across the Ohio river, has consented to the classifications and divisions of the business, and to the maximum rates of charge, and the schedule of tolls which that company is authorized and required by its charter to make; but can it be argued with any plausibility that Congress has thereby consented to the exercise, by one of the states creating the company, of the power to regulate the trade and travel across the bridge and upon the railway in both states? This would be to abandon uniformity where it is demanded; to invite conflicting legislation by the states; to merge the general in the local power, and overlook the inability of a state to give extra-territorial force to its laws.

There is, plainly, no consent by Congress, to the exercise of the power claimed in this case by the legislature of Kentucky, to classify the business, to regulate the charges

for travel and transportation upon and across the bridge of plaintiff in error, and the mode of collecting the same.

Such a regulation is a regulation of commerce among the states, which no state can lawfully exercise in the absence of affirmative legislation by Congress sanctioning it.

In sustaining the constitutionality of the acts in respect to the commerce feature of this case, the Court of Appeals of Kentucky gives as reasons for holding the acts not to be an infringement of the federal control over commerce among the states, the following:

"It is also contended by the appellee (plaintiff in error) that the classification of and rates for travel and transportation of freight over the bridge of the appellee is a legislative regulation of commerce among the states, and not a charge for the use merely of the structure. While the regulation of commerce among the states is subject to the control of Congress—for with that body the paramount authority resides—we are unable to perceive how the use of this bridge in aid of commerce, and upon which tolls are charged, is an interference with the federal power. *There has been no legislation by Congress adverse to this right of the state, and the lessening of tolls, it seems to us, would aid commerce instead of obstructing it in any way. This bridge is not a carrier of commerce, but others who transport commerce are permitted to use it as a means of facilitating trade and travel between the states, upon the payment of a reasonable toll, authorized to be exacted by the state.* The bridge spans the Ohio river between the large cities of Covington and Cincinnati. It is a Kentucky corporation, and no burden is imposed upon the carrier of commerce passing over it other than a reasonable charge for its use, and, in the absence of any regulation by Congress fixing the tolls, the power of the state to authorize by legislation the company to make a reasonable charge for its use, is included and fully sustained by decisions of the Supreme Court on the question." (Rec., p. 13.)

We will consider the reasons of the Court in this respect separately. And first, as to the validity of the acts in question, arising from the fact that there has been no

legislation by Congress adverse to this right of the State. The argument of the Kentucky Court of Appeals, and the argument of counsel for the Commonwealth in said Court, seem to proceed upon the theory that any and all regulations of commerce by a State are valid unless the authority of the Constitution has been put into execution by Congress, a theory long since overthrown and abandoned.

It has been decided by this Court that charges for the use of wharves in ports of the United States, pilot laws applicable to the ports, ferries, and bridges over navigable rivers, wholly within the State, may be made and regulated by the States.

See cases of

Wilson v. *Blackbird Creek Marsh Co.*, 2 Pet. 245.
Cooley v. *Port Warden, etc.*, 12 How. 299.
Gilmore v. *Phila.*, 3 Wall. 713.
Escanaba Co. v. *Chicago*, 107 U. S. 178.
Willamette Bridge Co. v. *Hatch*, 125 U. S. 1.
Packet Co. v. *Catlettsburg*, 105 U. S. 559.
Mobile v. *Kimball*, 102 U. S. 691.
Transportation Co. v. *Parkersburg*, 107 U. S. 691.
House v. *Glover*, 119 U. S. 543.
Packet Co. v. *Aiken*, 121 U. S. 444.
Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S. 196.

These cases were relied upon by the Kentucky Court of Appeals and by counsel to sustain their view of the constitutionality of the present acts.

In these cases it is held that these are charges for the use of property, and for personal services connected with the use, which the State in the exercise of its original power not surrendered to the general government may authorize in the absence of congressional legislation on the subject, but that such charges incidentally affect commerce among the States, and must give way whenever Congress chooses to interfere.

Thus these very numerous decisions of that court have consistently maintained the theory of concurrent juridiction over matters affecting commerce among the States,

where the regulation is local, and does not call for or admit of a uniform system of regulations, but can take effect within the locality, and where the power thus exercised exhausts itself within the limits of the State, "for the legislative authority of every State must spend its force within the territorial limits of the State."

Cooley's Const. Limit. (6th ed.) 149.

But a very broad distinction exists between these cases where the thing regulated is situated only in one state, and where the compliance with state regulations constitute local acts and are not of, and in themselves, acts of interstate commerce, and the present case, where the thing regulated is situated in two states, and where the compliance with the acts affects the passage of persons, animals, and vehicles over a bridge from one state to another. In the one case, commerce among the states is only incidentally affected; in the other, it is directly regulated. There is a manifest reason for this distinction, arising out of the possibility of conflicting state legislation in one case, and the absence of any such possibility in the other. Where the thing regulated and the act done is confined to the limits of one state, it is necessarily exempt from legislative action by any other state; and while in this instance each state might make different arrangements *in regard to like subjects*, the different arrangements would nevertheless apply to *entirely different subjects*. But in the other instance, where the thing to be regulated and the act done expands beyond the limits of one state and is embraced in more states than one, then to concede the authority to one state is to concede it to the other also, and a consequent conflict might arise—a conflict resulting in different rules in regard to the *very same subject-matter and the same acts*, and a consequent state of confusion, with no authority in the courts to declare the acts of either state void. In this particular case, the State of Ohio might prevent one coming upon its shores by way of the bridge of plaintiff in error without the payment of a greater toll than that required by the Kentucky acts, and still greater

confusion might arise by each state attempting to regulate the business over the bridge both ways, as is here attempted. That it is commerce in this case exclusively among states regulated in whole or on both sides of the river, by the laws of one state, or of each state separately, is apparent from the fact that even now one charge is lawful in Ohio by the laws of that state, and unlawful, not only when exacted in Kentucky, but in Ohio also, by the laws of Kentucky set up in this case.

Undoubtedly, the power claimed for the state, and exercised in this case, to make divisions and classifications of the business carried on among the states over the bridge attachment, to lower the charges therefor previously established, and to regulate the manner of collecting same, is a power to make other and *different* divisions and classifications; to throw a heavier burden on one class of business, a lighter burden on another; *to raise the charges* as well as to lower them, and provide other modes of collecting same. If each state possesses this power, the states may very well have conflicting interests, adopt different classifications, and differing schedules of charges and modes of collection. One state may have an interest to attract to its own side of the river the population engaged in the commercial and manufacturing business of the other. Residents, for instance, of the City of Covington engaged in large numbers in carrying on business and laboring in the City of Cincinnati must make two trips per day at least across the river, and will constitute a large, perhaps much the larger, number of foot passengers using the bridge. As the rates for foot passengers are lessened, this number of persons doing business in Cincinnati who reside in Covington must increase to increase the population and tax-payers of Kentucky. One of the arguments advanced for lowering the charge for a foot passenger from three cents to four-fifths of one cent is that it will increase the number of persons using the bridge.

To adopt a schedule, then, making the bridge toll free as to foot passengers, and throwing the burden of maintaining the structure and paying its interest, and

making a dividend for stockholders, on live stock, vehicles, and merchandise, might still further increase the growth of Covington. Each of the states might perceive some advantage for its own products or business in the classification of freights and business. Instead of the single duty of "fifty cents for ten tons and over" on the load, without regard to the character of the load, a different classification might be adopted both as to goods carried and the weight which should pay duty. If the power exists to classify and to regulate the charges, it is difficult to fix a boundary to it.

But such a power in the state to classify and fix charges upon the business, according to the provisions of the laws questioned in this case, embraces, necessarily, the power to classify the business upon the railway of plaintiff in error from its terminals in Covington to those in Cincinnati, and to make and adopt a schedule of rates and charges; as, for instance, so much for the passage of mail, express, and passenger trains, so much for freight trains carrying oil, or coal, or iron, or stone, or live stock, or box cars containing goods, wares, and merchandise, etc.

The acts in question apply to Kenton county only, while bridges spanning the Ohio river from points in Campbell county, Jefferson county, and other counties of the state, remain untouched by the classifications and rates thus established. This discrimination is a legislative regulation of commerce among the states of the gravest character, and not a charge for use of property merely. Is there power in the states along the shores of the Ohio, Mississippi, and other rivers separating states, to make these discriminating rates at pleasure, affecting, as they must and do, the trade and intercourse between the states? Could Ohio adopt a different classification and schedule of charges, arranged in such a manner as to divert trade and travel from the bridges at Louisville, and the numerous railways passing trains over them; or change the classification and rates adopted by Kentucky, and still in force within the limits of the latter state, throwing a heavier burden on travel on foot, a lighter one on merchandise,

vehicles, timber-wheels, etc.? Such a power, extending as it necessarily must to the business of, and the charges on, railroads using the bridges and railways upon and across them, which converge at Louisville on one side of the Ohio river, and Jeffersonville and New Albany, in the State of Indiana, on the other side of the same stream, and also at Covington, and Newport, and Cincinnati—can Indiana and Ohio each employ it to regulate the classifications of this immense commerce among the states, and the tolls it must pay both ways, and by laws that must spend their force within the limits of the state enacting them?

Each state has the same right to classify and exact tolls, and each, in doing so, will pay sufficient attention to the requirements of its own products and business and supposed interest. Each will retaliate, and resort to the perverted right of self-defense. We would have, not a uniform and consistent system of regulations of this commerce among the states, but the confusion and conflict of the days of the confederation, which ought to be as good to us as "a death's head or a *memento mori*."

With a view, therefore, to avoid this possible confusion, it has been repeatedly held by this Court that all that commerce among the states which consists in intercourse and traffic, including the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities, is by its very nature, of necessity, national in its character, requiring uniformity of legislation by Congress, and is not within the concurrent power of the states and the nation, and that the same must be free from any regulations by the states.

This rule was first announced in *Gibbons* v. *Ogden*, 9 Wheat., where an exclusive privilege granted by the State of New York to navigate the waters of that state by steam vessels was held void. No man can have a greater testimony to his genius and public services, than the development of the resources and power of the United States, which we witness to-day, bears to the great chief justice. His argument and decision in *Gibbons* v. *Ogden* made that development and power possible, by putting an end at the

threshold, to the attempt by a state to perpetuate the reign of confusion over commerce among the states.

The rule thus announced was re-affirmed and amplified in the case of the *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, holding that the business of a ferry plying between Gloucester, N. J., and Philadelphia, was transportation between the states, that intercourse and transportation between two states, no matter what might be the means employed, or the time consumed in making the transit, was interstate commerce, and that the state could impose no restrictions or regulations upon it.

But counsel for the Commonwealth relied upon this case to support their contention that the regulation of an interstate ferry is a matter of domestic concern, and argued that a bridge located in two states is in the same category. The following language, not necessary to the decision in that case, is relied upon by counsel for the Commonwealth:

"Freedom from such imposition does not of course imply exemption from reasonable charges as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on land or water, are not an interference with the freedom of transportation between the states, secured under the commercial power of Congress. That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property."

We maintain that the state regulations referred to as affecting such ferries must mean purely local regulations; that is, the conduct of the ferry-boat while in the waters of the state prescribing such regulations; we also maintain that the language in regard to the charges for the use of the property can not be construed to mean a right on the part of the state to prescribe these charges, but means that such freedom does not exempt commerce from such

reasonable charges as *the carrier himself* may choose to exact for his services in transporting passengers and freight on a ferry between states. We construe the language to mean that every charge made by a carrier for interstate transportation is, to the extent of such charge, a burden or restriction on commerce, and that commerce must, of necessity, be subject to such restrictions *imposed by the carrier* as compensation for his services.

But, if the learned justice who announced this decision meant otherwise than as we contend, and if such was the meaning of this court, then we contend that there is a manifest distinction between a ferry-boat chartered only by one state, and having its property in contemplation of law situated only in the state of its incorporation, and an interstate bridge located in and chartered by two states, and subject to two jurisdictions. The ferry-boat may possibly be considered for all purposes, as it certainly is for taxation, property situated wholly within the limits of one state. But, again, the only point decided in this case was that a ferry-boat between New Jersey and Pennsylvania was a means of interstate transportation, and that interstate transportation is of national importance and must be free from state impositions.

Then follows the decision in the case of the *State Freight Tax*, 15 Wall. 233, holding that an act of Pennsylvania which levied a tax upon the freight carried upon the railways and canals of the state was void as to freight taken up within the state and carried outside, or taken up outside and carried within the state. The reasons for so holding in this case, as stated in the opinion of Mr. Justice Strong, rested largely upon the theory that the tax imposed would probably result in an increased charge by the railways for transportation, and thus constitute a burden on commerce. Or, as was said in the opinion: "The tax will be added to the cost of transportation."

In the case of *Wabash, etc., Railway Co.* v. *Illinois*, 118 U. S. 575, Mr. Justice Miller is explaining, and, indeed, decidedly apoligizing for, as one of the survivors of the majority of the justices who decided those cases, the lan-

guage of the opinions in *Munn* v. *Illinois*, 94 U. S. 113, 115; *The Chicago, etc.*, v. *Iowa*, Ib. 155, 163, and *Peik* v. *Chicago, etc., Railway*, Ib. 164, 177–8. In each of those opinions it is said: "Until Congress acts in reference to their interstate relations the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction," etc.

After reviewing a number of the previous and subsequent opinions of the court, plainly holding that regulations of commerce between the states requiring a uniform rule could not be made by the states, or become valid laws, even although Congress had not acted on the subject, Mr. Justice Miller, speaking for the court, says: "We must, therefore, hold that it is not and never has been the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law." And so the Supreme Court decides in that case, in reference to the law of Illinois regulating the fares and freight on business taken up in that state and carried out, or taken up outside the state and brought within it.

After citing the case of the State Freight Tax, Mr. Justice Miller said:

"It is impossible to see any distinction in its effect upon commerce of either class, between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the state upon the same transportation."

If, therefore, the business of an interstate ferry or bridge can not be *taxed* by a state and if there is no distinction between such tax and a regulation of charges for transportation, does it not conclusively follow that the regulation of charges by the act of Kentucky, for the use of the bridge of plaintiff in error, in this case, is void.

In *Bowman* v. *Chicago and North-western Ry. Co.*, 125 U. S. 465, Mr. Justice Matthews reviews at length the opin-

ions of the court, and the argument of the several justices in cases previously decided by the Supreme Court upon the question whether, when Congress has failed to provide a regulation by law as to any particular subject of commerce among the states, it is conclusive of its intention that that subject shall be free from positive regulation, or that, until Congress intervenes, it shall be left to be dealt with by the states; and while this question is one to be determined from the circumstances of each case as it arises, that learned justice, delivering the opinion of the court in that case, holds that a state can not, however legitimate the purpose of such legislation may otherwise be, "enact laws which regulate commerce between its people and those of other states of the Union, unless the consent of Congress, express or implied, is first obtained." The statute of the State of Iowa forbidding common carriers to bring into that state from other states articles of merchandise, except on the terms prescribed by the law, was held to be repugnant to the Constitution of the United States, as a regulation of commerce.

The prescribed law differs in no essential particulars from the acts of the Kentucky legislature in question here.

These acts prescribe the terms upon which persons and property are allowed to make use of a highway situate in two states, in an intercourse and traffic exclusively between the states.

But in the "Original Package Case" (*Leisy* v. *Hardin*, 135 U. S.) the question is decided to be closed.

Speaking of the quoted views of Chief-Justice Taney, expressed in the New Hampshire case (*Pierce* v. *New Hampshire*), one of the "License Cases," reported in 5 How. 504, Mr. Chief-Justice Fuller, in the opinion in Original Package Case, says:

"But conceding the weight properly to be ascribed to the judicial utterances of this eminent jurist, we are constrained to say that the distinction between subjects in respect to which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, so far as relating to commerce, mere

aids rather than regulations, does not appear to us to have been sufficiently recognized by him in arriving at the conclusions announced. That distinction has been settled by repeated decisions of this court, and can no longer be regarded as open to re-examination. After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the states, and the exercise of power over purely local commerce and local concerns.

"The authority of *Pierce* v. *New Hampshire*, in so far as it rests on the view that the law of New Hampshire was valid because Congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to.

"The doctrine now firmly established is, as stated by Mr. Justice Field, in *Bowman* v. *Chicago, etc., Railway Co.*, 125 U. S. 507," and, after quoting from the concurring opinion in that case of Mr. Justice Field, Mr. Chief-Justice Fuller proceeds to say: "The conclusion follows that, as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states can not exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end." (P. 119.)

The judicial duty in this case is to determine whether the acts of the Kentucky legislature in question in this case fixing and regulating the charges to be made by plaintiff in error for person, animals, vehicles, and merchandise traveling and in transit across the bridge between Kentucky and Ohio, and regulating the mode of collecting same, is or not an exercise of power to regulate commerce among the states where "one system is required."

In the Original Package Case, *supra*, the chief-justice, attaching importance to the case of *Bowman* v. *Chicago, etc., Ry. Co., supra*, in repeating the grounds upon which the decision there rests, says: "It is explained that where

the state laws, alleged to be regulations of commerce among the states have been sustained, they were laws which related to bridges or dams across streams wholly within the state, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one state to another is in its nature national, admitting of but one regulating power; and it was to guard against *the possibility* of commercial embarrassments which would result if one state could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance into the state, that the power of regulating commerce among the states was conferred upon the federal government."

The language employed by the chief-justice is taken from the opinion of Mr. Justice Strong, in the "Case of the State Freight Tax," 15 Wall. 279-280. "Surely," says Mr. Justice Strong in that case, "transportation of passengers or merchandise through a state, or from one state to another. is of this nature. It is of national importance that over that subject there should be but one regulating power." "Cases," he says, "that have sustained state laws, alleged to be regulations of commerce among the States, have been such as related to bridges or dams across streams *wholly within a State*, police or health laws," etc. (P. 279.) "The subjects were such as in *Gilman* v. *Philadelphia*, it was said, can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." (P. 279.)

Not only must bridges be wholly within the borders of the State undertaking to establish them and to regulate their use, but ferries also.

Says Mr. Justice Field, delivering the opinion of the Court in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 166:

"In *Gibbons* v. *Ogden*, 9 Wheat. 203, Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the States, are component

parts of an immense mass of legislation, embracing every thing within the limits of a State, not surrendered to the general government; but in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country; for the power vested in Congress, he says, comprehends every species of commercial intercourse between the United States and foreign countries. No sort of trade, he adds, can be carried on between this country and another to which the power does not extend; and what is true of foreign commerce is also true of commerce between States over the waters separating them. Ferries between one of the States and a foreign country can not be deemed, therefore, beyond the control of Congress under the commercial power. They are necessarily governed by its legislation on the importation and exportation of merchandise, and the immigration of foreigners—that is, are subject to its regulation in that respect; and if they are not beyond the control of the commercial power of Congress, neither are ferries over waters separating States."

"It matters not," says Mr. Justice Field, in the same case, "that the transportation is made in ferry-boats, which pass between the States every hour of the day. The *means* of transportation between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens. . . . The power to regulate that commerce is the power to prescribe the rules by which it shall be governed . . . to determine when it shall be free and *when subject to duties or other exactions*. . . . While with reference to some of them which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. . . . Otherwise there would be no protection against conflicting regulations of

different States, each legislating in favor of its own citizens and products and against those of other States." (Page 162.)

This distinction between local powers and general powers, powers affecting a locality, and powers affecting commerce among two or more States, "amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the States, and the exercise of power over purely local commerce and local concerns." It is a distinction continually insisted upon by the Court in the numerous cases decided from *Wilson* v. *The Blackbird Creek Marsh Co.*, 2 Peters 245, in 1829; *Cooley* v. *The Port Wardens*, 12 How. 299, in 1851, down to the Original Package Case, *supra*, April 28, 1890.

In the latter case, the Chief Justice says, in delivering the opinion of the court: "The power to regulate commerce among the States is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to *local* needs and circumstances until Congress otherwise directs; but the power thus exercised by the states is not identical in its extent with the power to regulate commerce among the states. The power to pass laws in respect to *internal* commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to *locality*, essential to *local* intercommunication, to the progress and development of *local* prosperity, and to the protection, the safety, and the welfare of society, *originally*, necessarily, belonging to, and, upon the adoption of the constitution, reserved by, the states, except so far as falling within the scope of a power confided to the general government. Where the subject-matter requires a uniform system between the states, the power controlling it is vested exclusively in Congress, and can not be encroached upon by the states; but where, in relation to the subject-matter, different rules may be suitable for different *localities*, the states may exercise powers which, though they may be said to partake of

the nature of the power granted to the general government, are strictly not such, but are simply *local* powers, which have operation until or unless circumscribed by the action of Congress in effectuation of the general power."

This local power, called for by "local needs," "essential to local intercommunication," and the "development of local prosperity," originally necessarily belonged to and was reserved by the states.

But no state possessed originally the power to establish a bridge across waters separating it from another state, or to regulate the tolls upon it from both shores.

A bridge spanning the waters of the Ohio river, between the States of Kentucky and Ohio, is not a local structure; is pent up in no locality; it expands beyond the bounds of locality, or any mere infrastate needs or commerce; it is established in two states; it can not have an existence in one only; it is a highway for the commerce of all the states, and the whole unbounded continent may demand a uniform system of regulations to govern this commerce among the states.

It can not be successfully contended that legislation by the state, regulating the fares and charges over the bridge for a transportation of passengers and freight, which constitute in every instance and every item commerce among the states, is only a regulation of charges for the use of property and personal service connected therewith.

The question is directly decided in the case of the *Wabash, etc., Ry. Co.* v. *Illinois, supra.* Such fares, charges, tolls, by a railway company, chartered by and existing in the State of Illinois, are decided to be regulations of commerce, and when applied to passengers and freights taken up within the state for transportation to other states, or taken up outside the state and brought within the state, or in transit through the state, to and from other states, by acts of the legislature of Illinois, are held to be void, as in conflict with art. 1, sec. 8, of the Constitution of the United States.

Even the cases of *Munn* v. *Illinois*; *The Chicago, etc., R. R.* v. *Iowa*, and *Peik* v. *Chicago, etc., Ry. Co., supra*, which are questioned and practically overruled as to the constitutionality of such laws, by the later case assume, in the opinions rendered by Waite, C. J., that such legislation by a state, regulating fares and tolls, is a regulation of commerce among the states, valid by reason of the fact that Congress has failed to legislate on the subject.

Mr. Justice Miller, in delivering the opinion of the court, in *Wabash, etc., Ry. Co.* v. *Illinois, supra*, continuing, says:

"These extracts show that the question of the right of the state to regulate fares and tolls on railroads, and how far that right was affected by the commerce clause of the Constitution of the United States, was presented to the court in those cases.

"And it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the states in the absence of any legislation by Congress on the same subject.

"By the slightest attention to the matter, it will be readily seen that the circumstances under which a bridge may be authorized across a navigable stream *within the limits of a state*, for the use of a public highway, and the local rules which shall govern the pilots of each of the varying harbors of the coasts of the United States, depend on principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent," etc. (Page 568.)

The views of the majority of the court, in those remarkable cases, on this point, are now overthrown by the decision in this late case, and, in the opinion of Mr. Justice Miller, who, as one of the three remaining members of the majority of the court which decided these three cases, was prepared to take his share of the responsibility for the language used in these opinions. Certainly the authority of those cases was much shaken by Mr. Justice Miller's

opinion, and seems to have but little now to stand on, as an exposition of the peculiar doctrines of the Grangers, since the decisions of the court in the case of *Chicago, etc., Ry. Co.* v. *Minnesota*, 134 U. S., p. 418, and in the case of *Minneapolis, etc., Ry. Co.* v. *Minnesota*, Ib., p. 467, hereinafter referred to. And see the case reported in 13 S. E. Rep. 340, of *Norfolk & W. Ry. Co.* v. *Commonwealth*, decided by the Supreme Court of Virginia; also, *Stanley* v. *Wabash, etc., Ry. Co.*, by Supreme Court of Mo., May 19, 1890, 13 S. W. Rep. 709; also, *Hardy* v. *Atchison, etc., R. Co.*, reported in 18 Am. & Eng. R. Cases, 432. In this case Horton, C. J., speaking for the court, decides the point in the case at bar, and strongly questions *Peik, etc.*, v. *Chicago, etc., Ry. Co., supra*, taking the ground afterward occupied by Mr. Justice Miller, in the case in 118 U. S., *supra*. The opinion is interesting. The court cites, in support of its views, *Keiser* v. *Ill. Cent. R. Co.*, 16 Am. & Eng. R. Cases, 40; *Louisville & Nashville. R. Co.* v. *Railroad Com'rs of Tenn.*, Ib. 1; *Carton* v. *Ill. Cent. R. Co.*, 59 Iowa, 148; see also, 16 Am. & Eng. R. Cases, 22; *L. & N. R. R. Co.* v. *R. R. Com'rs of Tenn.*, opinion Hammond, J., reviewing Granger cases.

The constitutionality of these acts can not, therefore, be sustained upon the theory that they are proper police regulations of a state. As shown in the case of *Bowman* v. *Railway Company*, 125 U. S. 465, and *Leisy* v. *Hardin*, 135 U. S. 100, the power of the state to legislate in the interest of the health, morals, and sobriety of its inhabitants must be subject to the paramount authority of Congress over the matter of interstate commerce. It can not be successfully contended that the power of the state to regulate charges is of greater importance, or can have any greater efficiency as an exercise of the police power of a state as against the authority of Congress over matters of interstate commerce, than police regulations affecting the morals and sobriety of a community.

It will be seen in the opinion of the Kentucky Court of Appeals (Rec., p. 13) that that Court, in sustaining the validity of these acts, relies largely upon the assumption that the plaintiff in error is not as to its foot and wagon-

ways a common carrier, but that it only furnishes a facility for the carrying on of interstate commerce. Both counsel for the Commonwealth based their argument upon this assumption, and the attorney-general, in his argument, while admitting that, under the decision of the *Wabash Railway Co.* v. *Illinois*, 118 U. S., the state would have no power to regulate the charges of the railway, even over that portion of the structure which lies within its own borders, broadly asserted that, under the decision of the *Gloucester Ferry case*, the state would have a right to regulate the rates of toll, as provided in these acts, upon the foot and road-way portion of the structure, because as to that portion of the bridge, plaintiff in error is not a common carrier.

Both counsel for the Commonwealth relied largely upon the case of the *Kentucky and Indiana Bridge Company* v. *Louisville and Nashville R. R. Co.*, 37 Fed. Rep. 615, decided by Judge, now Mr. Justice Jackson, in support of their contention that plaintiff in error was not a common carrier of commerce, as to the portion of its bridge affected by these acts. But we assert that there is a manifest difference in the two cases, in that in the case referred to it was found that the Kentucky and Indiana Bridge Company was not in any sense a carrier, and that it merely furnished an artificial highway for the use of common carriers and others; whereas, plaintiff in error is admitted to be a carrier as to the railway part of its bridge, and we insist that the bridge is one entity, and that the foot-ways and wagon-ways are merely incident to the main feature, and can not, for any purpose, be separated from the bridge as a whole. The Courts have so decided.

We quote the following from the case of *State* v. *Hannibal & St. Joe R. R. Co.*, decided by the Supreme Court of Missouri, February, 1889, and reported in 10 S. W. Rep. 436, as sustaining this view:

"Rev. Stat., Mo., 1879, sec. 6901, provides for the assessment of bridges of joint stock companies and bridges for crossing which a toll is charged. Sections 6866 and 6876 provide for the assessment of all property of railroad companies, the road and rolling-stock to be assessed as a

whole: *Held*, that a bridge forming part of a railroad must be assessed with the road, and not as a separate structure, though it is used also for the passage of carriages and foot-passengers, for which tolls are charged.

. . . . . .

"A railroad company, with power to bridge navigable streams, was also given the powers conferred on a certain bridge company, and permitted, in connection with its railroad bridge, to erect a bridge for vehicles and foot-passengers, and to receive compensation therefor. Other railroads were given the right to use the bridge on terms to be agreed upon or fixed by the governor: *Held*, a bridge thus built was a railroad bridge and not a toll-bridge." The Court saying: "The bridge is an integral part of the road bed and track of defendants' road from Kansas City to Cameron, with a highway toll feature attached to it as a mere incident."

We therefore assert that the foot and wagon-ways of plaintiff in error, though passive agencies, are just as much a part and parcel of the business of carrying on interstate commerce as the ties and rails, and cars and employees of a railroad, which are also but instruments in transporting freight and passengers; and just why any fanciful distinction should be drawn is not apparent, unless the exigencies of the case demand it.

But, if we concede that such separation can be made, and such distinction drawn, and that plaintiff in error is not, as to its foot and wagon-ways, a carrier, we do not think that this fact can change the character or importance of its business as commerce. To maintain otherwise is to assume that carriage or transportation between the states is the only element of interstate commerce of national importance, requiring uniformity of regulation by Congress, and that every other item or element of commerce among states is within the concurrent power of the states and the nation.

But this assumption is not sound. The argument arises from the magnitude and importance which the business of transportation between the states has assumed in

very modern times. As late as 1824, it was seriously contended in the great case of *Gibbons* v. *Ogden*, 9 Wheat., that commerce among states was confined to intercourse and traffic, and to the purchase, sale, and exchange of commodities, and that transportation was not included in the grant of power over the subject of commerce; and Mr. Justice Johnson, in his concurring opinion in that case, said:

"Commerce in its simplest signification means an exchange of goods, but in the advancement of society, labor, transportation, diligence, care, and the various mediums of exchange become commodities, and enter into commerce."

See, also, the case of the *County of Mobile* v. *Kimball*, 102 U. S., where it was said:

"Commerce with foreign nations, and among the states, strictly construed, consists in intercourse and traffic, including in these terms, navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can only adopt such a system. Action upon it by separate states is not, therefore, permissible. Language, affirming the exclusiveness of the grant of power over commerce, as thus defined, may not be concurrent, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce."

So, also, in the case of *Wabash Railway Co.* v. *Illinois*, *supra*, while the question was of transportation between the states, the reasoning of the Court shows that the act of the legislature of Illinois was held to be unconstitutional, not so much because the commerce consisted in transportation, as because of possible conflicting state legislation, in a matter which required uniformity. Says the Court:

"If each one of the states through whose territories these goods are transported can fix its own rules for prices,

for modes of transit, for times and modes of delivery, and of the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation as an element of interstate commerce might be too oppressive to be submitted to. It was, in the language of the Court cited above, to meet just such a case that the Commerce Clause of the Constitution was adopted."

The business carried on over the foot and wagon-ways of plaintiff in error, if not transportation, is certainly intercourse, traffic, and transit, and is a means by which the purchase, sale, and exchange of commodities between Ohio and Kentucky is carried on. The acts in question seek to prescribe the rates and the conditions, and to classify and arrange the business thus carried on, and this is as much an attempted interference with the matter of commerce, belonging exclusively to Congress, as is an attempted interference with transportation between the states. The broad principle upon which rests the doctrine of exclusive authority of Congress in the cases heretofore cited, is the possibility of conflicting state legislation. Undoubtedly, there is the same possibility of conflicting state legislation arising out of an attempt by the states separately to regulate the business of plaintiff in error, as would be in a like attempt to regulate the business of common carriers of interstate commerce.

Again, conceding that the bridge is a mere artificial instrument so far as the wagon and foot-ways are concerned, the acts are still a regulation of interstate transportation, for the reason that the regulations made by the acts in question reduce the income from one portion of the property of plaintiff in error far below the aggregate of operating expenses and interest at five per cent upon the cost of that part of the property, making no allowance for annual repairs; indeed, the income will be less than such necessary operating expenses. Thus the aforesaid roadways are not only confiscated, but their possession and ownership must entail an annual expense above gross receipts increasing as the need of repairs grows. They

must then be abandoned, unless their deficiency in income to meet expenses, and interest on cost, and annual repairs, shall be thrown upon the income from railway trains using the property, freighted with passengers and merchandise from all parts of the United States. Legislators may perceive an advantage in this discrimination, as the additional burden will be borne mainly, or exclusively, by the whole country, while the business of our own city, and in which it is mainly interested, will not pay "scot and lot."

But this is a regulation of interstate commerce, and one state can not decide how its burdens are to be apportioned. Whether the classifications, divisions, and charges apply to business over one part of the line of road of plaintiff in error, as in the case at bar, or to another part, such as that just mentioned, it is equally and in all cases a division and classification for the purpose of fixing a reasonable charge for the use of property created in aid of commerce. If the rate for foot and wagon-ways is so low that expenses can not be made, that feature must draw from the main bridge.

These regulations directly affect commerce among the states. The power to make them, by one state, is the power to regulate commerce seeking transit over the line of road of plaintiff in error from Newport News, Norfolk, and Richmond to Chicago and the North-west, and back again.

The acts in question, so far as they relate to the property and business of plaintiff in error, are much more than a schedule of tolls for foot passengers, ordinary vehicles, merchandise carried therein, live stock, etc.; they undertake to discriminate against the trade and travel by railways passing over the lines and bridge of plaintiff in error, in favor of the former, and attempt to burden the commerce coming from distant and numerous states, north and south, east and west, with the annual expense of maintaining and operating that portion of the property devoted to the accommodation of the local business on each side of the Ohio river.

A state can not lawfully burden interstate commerce

by such regulations, nor, by its laws, determine what portion of that commerce "shall be free," nor "when subject to duties or other exactions."

In our contention in the Kentucky Court of Appeals, that the reduction of tolls on foot and wagon-ways amounted to a confiscation of that portion of our property, we were met by an argument of counsel for the Commonwealth, and by the Court of Appeals itself in its opinion rendered in the case, indicating as plainly as can be that we might prevent or offset any such result by an adjustment of charges on the railway portion of the bridge. We here quote the language of the Court as follows:

"It is further argued that the reduction of tolls on the foot and wagon-ways over appellee's bridge amounts to a confiscation of the property, and, as in the ferry case, the tolls, as reduced by the act of March, 1890, will not pay the expenses of keeping up the two ways. By the charter, the appellee was required to make these ways a part of the main structure, and while the income from the foot and wagon-ways may not, when applied to improving them alone, or keeping them in repair, be sufficient for that purpose, yet the entire structure may yield a handsome income. It is unlike the ferry purchased by the appellee, the Covington and Cincinnati Bridge Company, under the authority of the legislature. The ferry is distinct from the bridge, although the bridge company owns it, while the foot and wagon-ways are a part of the transfer company's bridge, and the profits on the entire structure must be considered. What these profits are does not appear, and we must assume, in the absence of testimony to the contrary, that the receipts from the structure are in excess of the expenditures, and before this court can undertake to say that the appellee has been deprived of compensation for the use of its property, we must be informed as to the revenue received from the entire structure, and, in the absence of such a showing, will not say that the legislature, in regulating these tolls, has violated both the federal and state Constitutions." (Rec., pp. 15, 16.)

It was thus admitted that the prescribed tolls do

amount to a confiscation of our foot and wagon-ways and of the ferry of the Suspension Bridge Company, and while the Kentucky Court of Appeals held the act unconstitutional as to the ferry because it was physically separated from the bridge, it was held constitutional as to the foot and wagon-ways of plaintiff in error's bridge, for the reason that we might exact greater charges on our railway to compensate for the reduction on the foot and wagon-ways. So that in this case, the necessary consequence of the regulation of the commerce between Covington and Cincinnati over the foot and wagon-ways of plaintiff in error, is to regulate and impose an additional burden on *interstate transportation*, that is on the business carried on by the railroad of plaintiff in error.

This argument is sustained by the view taken by this Court in the case of *The State Freight Tax*, *supra*, namely, that the tax imposed would indirectly amount to a regulation of the transportation by causing an increase of charges by the railroads.

As to the other reason assigned by the Kentucky Court of Appeals for sustaining the constitutionality of these acts, namely, that "the lessening of tolls, it seems to us, would aid commerce instead of obstructing it in any way" (which proposition was seriously urged in said court in the argument by counsel for the Commonwealth), we would suggest that it is not a question of a wise or unwise exercise of a right by the State of Kentucky, but a question as to whether or not the state did, in fact, have such a right. This was expressly admitted by one of the counsel for the Commonwealth in his argument in the State court. In his brief in that Court, he said:

"It is self-evident that the amount of toll authorized to be exacted by any particular legislative enactment can not in any way affect the question as to whether that legislative enactment is or is not a prohibited regulation of interstate commerce.

"In no case, nor under any conceivable circumstances, can the commerce clause of the federal Constitution have any concern with or bearing upon the amount or rate of

charges authorized to be exacted for the use of property, clothed with a public trust."

As before stated, to admit the right sought to be exercised in this particular case is to admit the right to increase the charges, or to impose a tax upon the business carried on over the bridge of plaintiff in error, or to make any other regulations of and concerning such business.

Before passing to the next question, we will briefly notice an argument insisted upon by counsel for the Commonwealth, in all of the hearings in the State Courts, namely, that the assertion of a right to charge tolls by reason of a provision contained in the Kentucky Charter of plaintiff in error is inconsistent with, and destructive to our contention that the present regulation is in violation of the commerce clause of the Constitution; that to urge the one is to abandon the other; and also, that the present act must of necessity be valid, or otherwise the Kentucky Charter, conferring a franchise to erect a bridge and charge tolls, would be invalid, and every right possessed by plaintiff in error would be destroyed. This objection ignores the fact that the charter offered by Kentucky was accepted by the company, and ignores the vital point that we claim the right to charge the tolls prescribed, not by virtue of the Kentucky Charter alone, but under the consolidated authority of both the States of Ohio and Kentucky; that the privileges conferred by the Kentucky Charter could be exercised only in the limits of Kentucky, and that it required the consolidated authority of both States, or at least a license from Ohio, to confer the right to charge for the use of the entire structure. It also ignores the fact that State acts, affecting interstate commerce, will be valid *if approved by Congress.*

See *Bowman* v. *Chicago, etc., Railway Co.*, 125 U. S. 465.

As before stated, we contend that the act of Congress authorizing plaintiff in error to erect its bridge did legalize the uniform rate established by the company, under the consolidated authority of both States. The contention that the present act, if contained in our original charter,

would of necessity be valid, and that therefore its invalidity would mean the invalidity of all charter rights of plaintiff in error seems based on the argument of Mr. Justice Bradley, in his dissent in the case of the *Wabash Railway Co.* v. *Illinois*, 118 U. S. 575. But there is a total lack of analogy between the Wabash case and the case at hand, which makes the argument in that dissent wholly inapplicable to the present case.

The act regulating the charges of the Wabash Railway Company was construed by the Courts to be limited to the territory of Illinois, and this fact constituted the foundation for the argument in that dissent.

II.

The acts in question are unreasonable, unjust, and oppressive, and impair rights of property which had vested previous to their passage, and for these reasons are in conflict with the Constitution of the United States, as depriving plaintiff in error of its property without due process of law, and as denying to it the equal protection of the laws; and being in conflict with the proviso to the general law of Kentucky reserving power to amend the charter of plaintiff in error violates the contract clause of the Federal Constitution, as well as the Bill of Rights contained in the State Constitution.

The general law of Kentucky, in force at date of plaintiff in error's charter, provides, Gen. Stat. (1888), p. 861:

"That all charters and grants of or to corporations or amendments thereof, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed; provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

The court has held, in the case of *Griffin* v. *Insurance Company*, 3 Bush, 594, that this "proviso was intended to

secure the rights of beneficiaries and *others*, vested under the charter before its amendment or repeal, and does not affect the mere power to repeal the franchise." The charter of the insurance company, in that case, had been repealed; its corporate life, the privilege to do business as a corporation was at an end, but vested rights were not to be impaired. The language of the court is different from that of the proviso to the general law; the court speaks of "the rights of (beneficiaries and) others"—but the law says "other rights previously vested," obviously in the company or in others, that is in any body.

The object of the proviso was to protect all vested rights from *impairment* by any repeal or amendment. No repeal or amendment could divest or take away from the company its title to its property—confiscate it, destroy it, appropriate it to public use, without just compensation previously made, or bestow it on another; neither could the company be deprived of the benefits of a contract lawfully made with others, any more than the obligations of the company previously entered into by contracts with others could be impaired. The "other rights" which the proviso protected, were rights other than the privileges and franchises, which gave the company corporate existence, and authorized it to do business as a body corporate and politic.

If a repeal of the franchise and privileges could take effect, or any amendment of the charter, without impairing other rights previously vested, such repeal or such amendment would be valid, but not in the other case.

After plaintiff in error, under the consolidated authority of the two States, has built its railway and erected its bridge structure in both, neither complete nor useful in only one of them, at a cost of over three millions of dollars, no one can deny but that a right of property has vested in plaintiff in error, which can not be impaired by any amendment to, or repeal of its privileges and franchises, without a violation of the contract between the state and plaintiff in error; nor that this right of property is only valuable for the uses of trade and travel across the Ohio river, and that the value

depends upon the right to establish and collect rates for its use.

The reservation of the right to repeal or amend the charters of corporations, does not increase the power which a state possesses over persons and property, but only removes, out of the way of proper legislation, the prohibition against the impairment of contracts contained in the federal constitution. The property and rights already vested remain, and are entitled to the equal protection of the laws accorded by state and federal constitutions to all other property and vested rights.

The power reserved to amend the contract made with plaintiff in error is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with *the scope and object* of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration.

The vested rights of property of corporations are surrounded by the same sanctions and are as inviolable as in other cases. The amendment must not defeat or substantially impair the object of the grant, or rights vested under it.

Sage v. *Dillard*, 15 B. M. 340.
Orr v. *Bracken County*, 81 Ky. 593.
Close v. *Glenwood Cemetery*, 107 U. S. 476.
Shields v. *Ohio*, 95 U. S. 324.
People v. *O'Brien*, 111 N. Y. 1.
City of Detroit v. *Plank R. Co.*, 43 Mich. 140.
Stone v. *Farmer's Loan & Trust Co.*, 116 U. S. 307.
Chicago, etc., R'y Co. v. *Minnesota*, 134 U. S. 418.
Minneapolis, etc., R'y Co. v. *Same*, 134 U. S. 467.

It seems clear that where the state has reserved the right to alter or amend the maximum rates fixed in the original contract, that good faith, what we call common honesty, that respect for justice which we are always obliged to attribute to the sovereign, demand that these rates should never be less than remunerative, according to the rate of profit common to the country. The sovereign holds out, in the original contract to the other party, the

inducement of fair profit, at least, for the expenditure of such large sums of money to improve his highways, for the benefit of his subjects. This inducement intentionally attracts money from all parts of this country and Europe, which freely seeks the investment, according to the confidence of the investor in the honor and fair dealing of the sovereign inviting it. A citizen of Holland, Belgium, or France, buying one of the mortgage bonds placed on its property by plaintiff in error, under the authority of Kentucky and Ohio, under the promise of tolls, the rates of which are fixed in the charter contract, although he sees that by the same contract those honorable states have reserved the right to amend it, does not doubt that any and all such amendments will allow plaintiff in error to collect a rate of tolls that will sustain the structure from year to year, pay the expenses of operation and the interest upon the money borrowed. He does not know of any country in Europe, able to borrow a dollar or build a bridge or railroad, that would claim a right to reduce the tolls so low that the payment of his interest would become impossible.

This view of the proper interpretation of the power and duty of the states under the qualified reservation of the right to amend the contract, at last, after some interruption, is adopted by this Court.

In the Granger Cases, above cited, reported in 94 U. S., a majority of the Court, in opinions rendered by Chief-Justice Waite, held that the legislature, in the exercise of the power of amendment, could fix or prescribe rates for service or the use of the property, which must not only be taken as reasonable, *prima facie*, but which were conclusive upon the courts and not to be questioned in any judicial proceeding. See *Munn* v. *Illinois*, 94 U. S. 113, and the cases decided at the same time called the "Granger Cases;" also, *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307.

So far as this Court was concerned, the important point thus ruled rested on these decisions, until the cases in 134 U. S. 418–482, of *Chicago, M. & St. P. Ry.*

Co. v. *Minnesota*, and *Minneapolis Ry. Co.* v. *Same*, were decided. In these cases, the point is ruled the other way by the majority of the Court (six to three), and the judgment of the Supreme Court of Minnesota of May 4, 1888, and of the same Court of February 27, 1889, are reversed, because the legislature of the state had undertaken to fix what was a reasonable rate of charge for transportation by a railroad company, denying the company the opportunity and right to question the reasonableness of such charge by judicial investigation. Says Mr. Justice Blatchford, delivering the opinion of the Court:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." P. 458.

Mr. Justice Miller, who had united with the majority of the Court in the decisions given in the Granger Cases, in a concurring opinion now given in these cases, expresses his views in the form of propositions, No. 3 and No. 4, being as follows:

"Neither the legislature nor such commission acting under the authority of the legislature, can establish arbitrarily, and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaging in the carrying business, on the one hand, nor so exorbitant and extravagant as to be in utter disregard of

the rights of the public for the use of such transportation on the other.

"4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law."

The dissent in those cases, written by Mr. Justice Bradley, also shows, distinctly, that the decision of the court now rendered "practically overrules *Munn* v. *Illinois*. 94 U. S. 113, and the several railway cases that were decided at the same time," as that learned justice there says.

The rule for which we contend has been nowhere more clearly stated than in the opinion of Judge, now Mr. Justice Brewer, in case of *Chicago and North-western Railroad Company* v. *Day et al., Railway and Commissioners*, 35 Fed. Rep. 866, where the commissioners of the State of Iowa attempted to regulate the rates to be charged by this railway company for transportation of persons and property. One of the defenses set up by the railroad company was that the rates were unreasonable and unjust. Mr. Justice Brewer, then on the United States Circuit bench, said:

"It is obvious, from the mere fact that the legislature has pursued the forms of law in prescribing a schedule of rates, does not prevent inquiry by the courts, and the question is open and must be decided in each case, whether the rates prescribed are within the limits of legislative power, or are mere proceedings which, in the end, if not restricted, will work a confiscation of the property of the complainant."

He further says that a legislature may reduce rates in the exercise of its police power, until only a minimum of compensation is secured to the owner, but that the owner must be allowed an opportunity to make some compensation as a return for his capital invested, and says:

"The rule, therefore, to be laid down is this, that

where the proposed rates will give some compensation, however small, to the owners of the railroad property, the courts have no power to interfere. An appeal must then be made to the legislature and the people, but, where the rates prescribed will not yield some compensation to the owners, then it is the duty of the courts to interfere and protect the companies from such rates. Compensation implies three things—cost of services, interest on bonds, and then some dividend. Cost of services implies skilled labor, the best appliances, keeping of the road-bed, and cars and machinery and other appliances in perfect order and repair. If the rates are so reduced that no dividends are possible, and especially if they are such that the interest on the mortgage due is not earned, then the enforcement of the rates means either confiscation or compelling, in the language of the Supreme Court, the corporation to carry persons or property without reward."

We are not unmindful of the decision of this Court in the case of *Budd* v. *New York*, 143 U. S. 517, in which it is held that the case of *Chicago, etc., Railway Co.* v. *Minnesota, supra*, did not decide any thing except the question raised in that case, to wit, that the action of a board appointed by the legislature was not final and was open to judicial inquiry, but it seems to us, in view of the broad proposition laid down by Mr. Justice Blatchford and the Court in that case, heretofore quoted from page 458 of the report and the language of the concurring justice, Miller, and the dissenting justice, Bradley, that it must be conceded that the effect of that decision was as contended for by the justice last named, and when we add to this the decision of this court in the case of *Chicago, etc.*, v. *Wellman*, decided the very same day the Budd case was decided, and consider the language of the opinion, "The legislature has power to fix rates and the extent of judicial interference is protection against unreasonable rates" (143 U. S. 344), citing the very case that it is contended did not decide that question, to wit, *Chicago, etc.*, v. *Minnesota*, we are the more constrained to the view that the last named case laid down a principle applicable to the legislature itself. And why

not? There seems to be a consensus of opinion that the legislature can not arbitrarily deprive a person of property without due process of law, whatever be the difference in opinions as to the legislative regulations. Mr. Justice Bradley even says: "I do not mean to say that the legislature, or its constituted board of commissioners, or other legislative agency, may not so act as to deprive parties of their property without due process of law. The Constitution contemplates the possibility of such an invasion of rights. But, acting within their jurisdiction (as in these cases they have done), *the invasion should be clear and unmistakable* to bring the case within that category." And again, "Deprivation of property by mere arbitrary power on the part of the legislature, or fraud on the part of the commission, are the only grounds on which judicial relief may be sought against their action." *Chicago, etc.*, v. *Minnesota*, *supra*, pp. 465, 466. And, says Justice Blatchford, in the same case: "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States." Ibid. 458. And, if it be true, as he says, that the regulation that deprives of the use, in effect, deprives of the property, be it little or great, it would seem to follow that the imposition of an unreasonable rate was a subject of judicial inquiry, otherwise how is it to be determined and how does it appear? One is entitled to the same use of property and a like return as other persons, so it is said, and if he is deprived of it by legislative enactments, it can be no question of degree, it is, though ever so small, a deprivation of his property, and therefore a matter to be judicially investigated. It is urged that there must be a final tribunal somewhere for deciding every question, and that even the courts are not infallible, and yet it is quite plain that one who has had his day in court and had his hearing can not be likened to the one

who has not been heard, and it is a misnomer to speak of a final tribunal without a hearing can be had before it.

It seems, therefore, impossible to question the fact that the court has decided that the reasonableness of a charge by a railroad, for transportation, is a judicial question, and that to deprive the company of the power to make reasonable charges for the use of its property, in the absence of an investigation by judicial machinery, is (1) to deprive it of its property without due process of law; and that, in so far as it is thus deprived, while other persons are permitted to receive *reasonable profits upon their invested capital*, the company is (2) deprived of the equal protection of the laws. Courts can not explain away the decisions. The decisions do not rest on the ground that the legislature has intrusted a commission with the exercise of this arbitrary power, but on the ground that the legislature itself can not exercise this power; if it possesses the giant's strength, it can not use it like a giant.

The acts, therefore, violate Amendments V and XIV of the Constitution of the United States, and are forbidden by the proviso to the statute of this state, reserving the right to change, or amend, or repeal the otherwise irrepealable contract of the charter of plaintiff in error fixing a maximum rate of charges, and thus the aforesaid acts violate the contract clause of the Federal Constitution and the Bill of Rights contained in the State Constitution.

The facts agreed upon in this case, upon the submission and trial below, show that the rates of toll, in the aggregate, have been reduced by the acts in question more than one-half; that the gross earnings from the use of the foot passenger and ordinary ways, for the eight months previous to April 30, 1890, the period of time before the finding of the indictment against plaintiff in error, during which the ways had been open to the public, were, according to the rates allowed and adopted before the said reduction, insufficient to meet the expenses of operating those ways, and the interest at 5 per cent upon the portion of the bonded indebtedness applicable to their cost,

without any estimate for annual repairs, by the sum of $10,060.52; while at the rate of the reductions now attempted, the deficiency would have amounted to the sum of $21,493.54, or for 12 months to the sum of $32,240.31.

Mere operating expenses for the 8 months were..	$12,185 91
While at the reduced rates receipts would be.....	10,692 37
Mere expenses over receipts for 8 months...	$1,493 54

To throw the burden of maintaining that part of the structure on the engines and trains of railroad companies using the line of railway of plaintiff in error, would not only be a regulation of commerce among the states discriminating against the traffic by railroads, but imposing an unreasonable burden on that traffic, supported by unreasonable rates of toll. Now, the charter of plaintiff in error does not prescribe a maximum rate for that business, but leaves the schedule of charges therefor to the discretion of plaintiff in error; this is only an authority to take reasonable tolls, as all the cases hold, and plaintiff in error would be guilty of extorting unreasonable tolls from the railroad business, by adding to reasonable charges upon it the heavy loss which the new rates impose on the other branch of the business.

It is submitted that such an amendment to the maximum rates allowed by the charter lacks the element of reasonableness; that, so far as it is unreasonable, it deprives plaintiff in error of its property previously lawfully vested, without due process of law; "and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws," all in violation of the Constitution of the United States.

The evidence, therefore, introduced upon this question of reasonableness was directly relevant and important, and leaves no room to doubt that the acts in question deprive plaintiff in error of a portion of its property, and must drive it to impose a greater burden upon the other com-

merce among states which seeks transit over plaintiff in error's railroad and bridge, until the same unlimited power, if it indeed has any existence, again interferes and confiscates the remainder of the property.

WM. H. JACKSON,
W. H. WADSWORTH,
Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893.

The Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company,

Plaintiff in Error.

No. 1042. vs.

The Commonwealth of Kentucky,

Defendant in Error.

In Error to the Court of Appeals of Kentucky.

BRIEF FOR DEFENDANT IN ERROR.

WM. GOEBEL,
Attorney for Defendant in Error.

ATT'Y-GEN'L WM. J. HENDRICK,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893.

The Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company,

Plaintiff in Error.

No. 1043. VS.

The Commonwealth of Kentucky,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error was created by an act of the General Assembly of the Commonwealth of Kentucky, approved February 9, 1886, and empowered to construct a railway and highway bridge across the Ohio river between the cities of Covington, Kentucky, and Cincinnati, Ohio, and to exact tolls for the use of the bridge. The charter provided, in Section 11, among other things, that the corporation

"Shall not be consolidated with the Covington and Cincinnati Suspension Bridge Company, nor sell, hire, or lease to said Covington and Cincinnati Suspension Bridge Company either the said road-ways for foot passengers or for vehicles, nor make nor enter into any combination or agreement with said Suspension Bridge Company for a division of tolls or other profits, or any other agreement for increasing or maintaining the rate of tolls; and the rate of toll upon said road-ways shall at no time

exceed the rate charged by said Covington and Cincinnati Suspension Bridge upon January 1, 1886."

The bridge was constructed. By two acts, approved April 9, 1890, entitled, respectively, "An act to regulate bridges spanning the Ohio river from points within the county of Kenton, and tolls on the same" and an act amending the charter of plaintiff in error, the General Assembly of Kentucky fixed a maximum of tolls to be charged for travel on the foot-ways and wagon-ways of the bridge, and made disobedience of the acts a misdemeanor, punishable by fine. The corporation refused to conform to the acts, and thereupon was indicted thereunder in the Kenton Criminal Court, at its May Term, 1890. On the trial, the cause was submitted to the court without the intervention of a jury, the allegations of the indictment being admitted to be true and the defendant filing, as evidence, a statement, in the form of an affidavit of its secretary, which was admitted, subject to objection for relevancy and competency. The court dismissed the indictment upon the ground that the provision of the corporate charter, quoted above, constituted a contract as to the tolls the corporation might charge, and that that contract was impaired by the legislation of 1890, which fixed a lower maximum of rates. On appeal to the Court of Appeals, that judgment was reversed, the latter court holding that the charter provision in question did not make a contract. Thereupon the cause was redocketed in the lower court, and re-submitted to that court, in the same manner, and upon the same terms, as originally submitted, and a judgment rendered imposing a fine under the acts in question; which judgment was, on appeal to the Court of Appeals, affirmed.

Plaintiff in error asserts that the acts of 1890 impair the obligation of its alleged contract as to tolls for use of the foot-ways and wagon-ways; that the acts are in conflict with the commerce clause of the Federal Constitution, and that they take property without due process of law.

I.

The inconsistency of the first and second objections made to the acts of 1890.

It seems clear that the second proposition advanced by the plaintiff in error is necessarily destructive of the first; that to advance the second proposition is totally to deny the soundness of the first.

What is implied in the claim that the corporation has, by force of legislation of Kentucky, an inviolable contract fixing maximum rates of toll for the bridge? There is necessarily implied in, and carried with that claim, the further claim that the Kentucky General Assembly has the constitutional power to legislate with reference to the tolls for passage over bridges spanning the Ohio river, and that further claim is a denial that such legislation is in any wise in conflict with the commerce clause of the Federal Constitution. Can plaintiff in error, by virtue of Kentucky legislation, have the right to take for all time the same toll that was exacted by the Covington and Cincinnati Bridge Company on January 1, 1886, if Kentucky legislation as to tolls on bridges spanning the Ohio river be an unconstitutional regulation of interstate commerce? Can the grant thus claimed be effective for any purpose, or to any extent, if such legislation be a prohibited regulation of interstate commerce?

It is as indisputable as anything can be, that if the acts of 1890 are prohibited regulations of interstate commerce, then in the very nature of things the Bridge Company can not have any contract whatever, violable or inviolable, by force of any state legislation, whether of one state or more than one.

It must be obvious to the court that upon this branch of the case the bridge company does this. It denies that such parts of the Kentucky legislation concerning tolls on the bridge as suits its purposes are in conflict with the commerce clause of the

Federal Constitution, and at the same time affirms that such parts of that same legislation as do not suit its purposes are in conflict with that constitutional provision, although the only difference between the legislation as to which these inconsistent claims are made is, that that which is asserted to be invalid fixes a lower maximum of tolls than does that which is asserted to be valid. It is self-evident that *the amount of toll authorized to be exacted* by any particular legislative enactment can not in any way affect the question as to whether that enactment is, or is not, a prohibited regulation of interstate commerce. In no case, nor under any conceivable circumstances can the commerce clause of the Federal Constitution have any concern with, or bearing upon, the amount or rate of charges authorized to be exacted for the use of property clothed with a public interest.

II.

The business or employment of the bridge company is not commerce, and the acts of 1890 are not regulations of commerce. Those acts are regulations of charges for the use of artificial facilities constituting mere local aids to commerce, and affect commerce only incidentally. Such facilities do not require, nor admit of, uniformity of regulation; and, Congress not having legislated on the subject, it was competent for the State to do so.

A state having power to impose charges for the use of such facilities, it has also power to determine what the charges shall be.

The business or employment of the bridge company is not commerce of any kind—internal, interstate, or foreign. There-

fore, legislation regulating the tolls of the corporation is not a regulation of interstate or foreign commerce.

The argument advanced in this cause that the bridge company is engaged in interstate commerce, because its bridge extends beyond the limits of the state of Kentucky to Ohio, assumes that the corporation is engaged in commerce—that its business or employment is commerce of some kind. That assumption is denied. Without that unauthorized assumption, the argument is foundationless.

The bridge company is simply the owner of a highway bridge, which it permits others to use upon payment for the use.

There is nothing in this record to show even that any one who uses the bridge for passage is engaged in commerce. Of course, any common carrier that would use the bridge to transport persons or property, or both, from one of the states of Kentucky and Ohio, to the other, would engage in commerce. The business or employment of such a carrier would be commerce, and a regulation of the charges of such a carrier would be a regulation of interstate commerce.

But the owner of this highway bridge neither carries, transports, nor transmits anything of any kind; it does not assume possession, custody, or control of anything which is the subject of commerce; it neither buys, sells, or otherwise deals, either for itself or others, in anything which is, or is not, the subject of commerce. It is simply and only the owner of a stationary artificial structure which it permits others to use upon the payment of compensation for the use.

It is believed that no case will be found in which it has ever been held that the mere owner of a stationary artificial structure, who permits it to be used by others upon payment of compensation for such use, without himself ever having custody, possession, or control of anything which is the subject of commerce, and who neither carries, transports, nor transmits anything, and who does not either buy, sell, or otherwise deal in anything which is the subject of commerce, is himself engaged in com-

merce, or that a regulation of the charges of the owner of such a structure is a regulation of commerce.

The decisions of this court sustaining state legislation, under which charges for the use of wharves and docks on rivers forming the boundary between states were exacted, and the decisions of this court sustaining state legislation, under which were exacted charges for the use of locks on a navigable river wholly within a state—the river forming a highway for interstate commerce—were not founded upon the theory that the owners of the wharves, docks and locks were engaged in domestic or internal commerce, as distinguished from interstate and foreign commerce; and that, therefore, legislation authorizing or regulating such charges was a regulation of internal or domestic commerce. The proposition upon which those decisions are in part founded is that the owners of such artificial facilities are not engaged in commerce of any kind; and that, therefore, state legislation concerning such charges, while it may incidentally affect commerce, is not a regulation of commerce itself in the constitutional sense.

That the bridge extends from Kentucky to Ohio is, so far as the matter in hand is concerned, unimportant. Whether any given business or employment is commerce, or not, depends upon the character of that business or employment, not upon the place where, or the location in which, it is conducted. Location or situation may determine whether commerce is domestic, interstate or foreign, but has no bearing upon the question whether any given business or employment is commerce or not commerce.

If a dock or wharf on the Mississippi river at the boundary line between Louisiana and Arkansas were situate partly in one of those states and partly in the other, the business or employment of the owner would not be commerce, any more than it would be if the dock or wharf were wholly within one of those states; and state legislation concerning charges for the use of such aids to commerce, would not be a regulation of commerce of any kind, any more than was the state legislation on such

subjects which this court has sustained. And so with this bridge. The bridge company is not engaged in commerce any more than it would be if the bridge were wholly within the limits of Kentucky; and, consequently, a regulation of its tolls is not a regulation of commerce any more than it would be if the bridge did not extend to another state.

This matter is made clear by the opinion of Mr. Justice Jackson, when on the Circuit Court Bench, in *Kentucky & Indiana Bridge Co.* vs. *L. & N. R. R. Co.*, 37 Federal Rep , 616.

The question in the case was whether the Bridge Company was a carrier of interstate commerce as to freight If it was, it came within the provisions of the Interstate Commerce Act. If it was not, then it did not come within that act. The court said:

"The franchises and powers conferred upon petitioner of building, maintaining, and operating its bridge and approaches, designated as its terminal facilities, do not, in and of themselves, constitute it a common carrier of property; on the contrary, they are appropriately confined to the erection and maintenance of a thoroughfare or public highway, open to the use of others, common carriers and private parties, upon making compensation therefor in the shape of 'reasonable tolls.' These 'tolls,' which petitioner is authorized to charge for the use of its bridge are not applicable to nor demandable for any transportation service it may perform or be permitted to render. The word, as used in its charter, is strictly applicable to charges for the *use* of its highway, rather than to compensation for transportation services to be performed by itself. The distinction between such an incorporated bridge or highway, established and maintained for *use* by common carriers and others, upon paying compensation for such use in the way of 'tolls,' however graduated, and that of an incorporated common carrier engaged in transporting property for hire is well defined."

But, if the distinction here contended for were not well

founded, and if the bridge company were engaged in commerce, the result would be the same.

Not every legislative enactment of a state which affects interstate or foreign commerce is prohibited by the commerce clause of the Federal Constitution.

This matter is clearly defined in *Mobile County* vs. *Kimball*, 102 U. S., 691. Mr. Justice Field wrote the opinion.

"The objection that the law of the state, in authorizing the improvement of the harbor of Mobile, trenches upon the commercial power of Congress, assumes an exclusion of state authority from all subjects in relation to which that power may be exercised, not warranted by the adjudications of this court, notwithstanding the strong expressions used by some of its judges. That power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several states, and to adopt measures to promote its growth and insure its safety. And, as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the states connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale and exchange of commodities. Here there can, of necessity, be only one system or plan of regulation, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation

is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and citizens, and against the products and citizens of other states. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation.

"Of the class of subjects local in their nature, and intended as mere aids to commerce, which are best provided for by special regulations, may be mentioned harbor pilotage, buoys and beacons to guide mariners to the proper channels in which to direct their vessels."

* * * * * * *

"The uniformity of commercial regulations which the grant to Congress was designed to secure against conflicting state provisions was necessarily intended only for cases where such uniformity is practicable. Where from its nature or the sphere of its operations the subject is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that, for the time being, and until it sees fit to act, they may be regulated by state authority."

In *The Gloucester Ferry Company* vs. *Pennsylvania*, 114 U. S., 196. there came in question the validity of a tax sought to be imposed by the State of Pennsylvania on the capital stock of a ferry corporation. The corporation was chartered by the State of New Jersey, and its business was the transportation of per-

sons and property across the Delaware river, between the states of New Jersey and Pennsylvania. It was held that the ferry was a means of interstate commerce; that the tax sought to be levied by Pennsylvania was the imposition of a burden on, and an unconstitutional interference with, interstate commerce, and, therefore, void. In the opinion, the court, by Mr. Justice Field, not only clearly defined what legislation is prohibited to the states by the commerce clause of the Federal Constitution, but also clearly defined what legislation which affects interstate commerce is not prohibited to the states by the Federal Constitution, and has from the foundation of the National Government been enacted by the states. The court, in concluding its opinion, said:

"It is true that from the earliest period in the history of the Government the states have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the states can more advantageously manage such interstate ferries than the General Government; and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and under such regulations as may be required for the safety, comfort, and convenience of the public. Still the fact remains that such a ferry is a means—and a necessary means—of commercial intercourse between the states bordering on their dividing waters; and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such impositions does not, of course, imply exemption from reasonable charges as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property either on water or land are not an interference with the freedom of transportation between the states

secured under the commercial power of Congress." (Here are cited a number of cases).

"That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property."

There is no difference in principle, as to the matter of interstate commerce, between an interstate ferry and an interstate bridge. It is equally as true of bridges as it is of ferries, that "from the earliest period in the history of the government the states have authorized and regulated bridges, not only over waters entirely within their limits, but over waters separating them." All the bridges spanning the Ohio river at Cincinnati were constructed under state legislation—charters granted by Kentucky.

From the foundation of the Government, the states have exercised the power of constructing and regulating bridges over rivers dividing them. And Congress has clearly recognized this power in the states by formally consenting to the constructing and maintaining of such bridges under state authority. In each instance Congress has merely insisted upon such conditions as were, in its opinion, necessary to protect the navigation of the rivers from unreasonable obstructions. The history of these acts of Congress is given in *Newport & Cincinnati Bridge Co.* vs. *U. S.*, 105 U. S., 470.

The Federal Congress has never established a ferry, nor passed any law authorizing the taking of toll on either a bridge or a ferry, nor passed any law regulating tolls on either a bridge or ferry. As said in the Gloucester Ferry case:

"Congress has passed various laws respecting such international and interstate ferries, the validity of which is not open to question. It has provided that vessels used exclusively as ferry boats, and carrying passengers and merchandise, shall not be required to enter and clear, nor shall their masters be required

to present manifests, etc.; that the lights for ferry boats shall be regulated by such rules as the Board of Supervising Inspectors of Steam Vessels shall prescribe; that the hull and boilers of every ferry boat propelled by steam shall be inspected, etc."

In the same way every bridge constructed across a navigable river on which interstate commerce may be transported, whether the river forms a boundary between states or not, must conform to requirements made by the Federal Government as to height, etc. But Congress has never attempted to regulate *the operation* of bridges or ferries, nor the tolls or fares on either. These matters Congress has left to the states, and the states always have regulated and controlled them.

In *Packet Co.* vs. *Keokuk*, 95 U. S., 80, it was claimed a state statute authorizing the collection of wharfage was an invalid regulation of interstate commerce, because the wharves were upon one of the great waterways of the country dividing two states. It was held:

"A charge for services rendered, or for conveniences provided, is in no sense a tax or duty. It is not a hindrance or impediment to free navigation. . . . It is a tax or duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character."

In *Huse* vs. *Glover*, 119 U. S., 543, it was held that state legislation authorizing the taking of toll for passage through locks on a navigable river subject to Federal control was not a regulation of interstate or foreign commerce. The court said:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost on the navigation of the stream."

In *Ouachita, etc., Packet Co.* vs. *Aiken*, 121 U. S., 444, where it was claimed that excessive wharfage was exacted under authority of legislation of the state of Louisiana for the

use of wharves on the Mississippi river, and the interstate commerce question was raised, the court, by Justice Bradley, said:

"The case is clearly within the principle of the former decisions of this court, which affirm *the right of a state, in the absence of regulation by Congress, to establish, manage, and carry on works and improvements of a local character, though necessarily more or less affecting interstate or foreign commerce.* We may particularly refer to the recent cases of * * *; in the various cases of bridges over navigable rivers which came before this court, and which are reviewed and approved in *Escanaba Co.* vs. *Chicago*, 107 U. S. * * *

"In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States can not, as such, interfere with the regulations made by the states, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded, or for services rendered under state authority. It is for Congress alone, under its power to regulate commerce with foreign nations and among the several states, to correct any abuses that may arise, or to assume to itself the regulation of the subject. * * * *If the charges are unreasonable, remedy must be sought by invoking the laws of the state*, which can not be done in this suit. * * * If the state laws furnish no remedy (in other words, if the charges are sanctioned by them), then, as before stated, it is for Congress, and not the United States courts, to regulate the matter and provide a proper remedy. Such an interposition may become necessary, for although the imposition of unreasonable wharfage by a city or state is always the dictate of a suicidal policy, the temptation of immediate advantage under stringent pressure will often lead to its adoption."

Has not this court adjudged that a state has power to establish an interstate ferry, and to fix and regulate the tolls to be charged for use of it?

In a case involving a ferry on the Ohio river, between the cities of Covington and Newport, operated under a franchise granted by Kentucky, this court said:

"There has been now nearly three-quarters of a century of practical interpretation of the constitution. During all that time as before the constitution had its birth, the states have exercised the power to establish and regulate ferries—Congress never. We have sought in vain for any act of Congress which involves the exercise of this power. That the authority lies within the scope of that immense mass of undelegated powers which are reserved to the states, respectively, we think too clear to admit of doubt. *We place our judgment wholly upon that ground.*" *Conway* vs. *Taylor's Executors*, 1 Black, 365.

"Still the fact remains that such a ferry is a means—and a necessary means—of commercial intercourse between the states bordering on their dividing waters; and it must therefore be conducted without the imposition by the states of taxes or other burdens upon the commerce between them. Freedom from such imposition does not, of course, imply exemption from reasonable charges as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property either on water or land are not an interference with the freedom of transportation between the states secured under the commercial power of Congress." (Here are cited a number of cases.)

"That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property."

"How conflicting legislation of the two states on the subject of ferries on waters dividing them is to be met and treated is not a question before us for consideration. Pennsylvania has

never attempted to exercise its power of establishing and regulating ferries across the Delaware river." *Gloucester Ferry Co.* vs. *Pennsylvania*, 114 U. S., 196.

Of course, the state legislation here meant includes state legislation concerning tolls, because the court declares that the states have power to impose charges in the way of tolls for use of the ferry.

Can it be questioned that this language is a declaration that states may by legislation impose "charges as compensation for the carriage of persons, in the way of tolls or fares," by interstate ferries which they establish? The language quoted from the opinion deals with state legislation and "imposition by the states," upon interstate ferries and the use of them.

"It (that is such a ferry) must therefore be conducted without the imposition by the states of taxes or other burdens upon the commerce between them."

The "imposition by the states" could, of course, be made only by or under legislation of a state.

"Freedom from such imposition does not, of course, imply exemption from reasonable charges as compensation for the carriage of persons, in the way of tolls or fares."

This can mean nothing other than that the tolls or fares imposed for the use of the interstate ferry may be imposed by legislation of the states.

"That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use."

The charges here referred to as imposed by way of compensation for the facilities furnished, are necessarily charges imposed by state legislation, and the charges meant are the tolls.

This court has thus clearly adjudged that a state may by legislation impose a charge in the way of tolls as compensation

for the use of an interstate ferry which the state establishes. The power to impose a charge for the use of such a facility, necessarily carries with it the power to say what the charge shall be. Therefore, when a state establishes a ferry, it has the power to declare what shall be the toll for use of it.

If a state has power to fix the toll for use of an interstate ferry established by it, or under its authority, then does it not follow that it has power to fix the toll for use of an interstate bridge established by it or under its authority? The reason for an affirmative answer is greater in case of a bridge than in that of a ferry, because a ferryman or a ferry corporation is a carrier, and does assume possession of persons and property, and does transport them; while a bridge company is not a carrier, and transports nothing. A bridge company is the mere owner of a highway used by others. A bridge is a mere substitute for a ferry.

It would be strange indeed if, as decided in the Gloucester Ferry Co. case, 114 U S., the state of Kentucky has the constitutional power, notwithstanding the commerce clause of the Federal Constitution, to establish a ferry on the Ohio river between the cities of Covington and Cincinnati, and regulate it and the tolls to be charged for the use of it, and that at the same time it has not the power to regulate the tolls on a bridge seventy-five or one hundred feet above that river at the same place—the bridge having been established and constructed under the authority of the state, just as was the ferry.

The tolls for the use of interstate bridges neither require nor admit of uniformity of regulation. What would be a reasonable toll for use of a bridge at St. Louis or at New York might, and probably would be, an inadequate compensation at Cincinnati, Louisville, or Memphis. The reasonableness or unreasonableness of such regulations depends upon the local conditions of the place where the bridge is located, just as the reasonableness or unreasonableness of the tolls of a ferry depends on local conditions.

On none of the great water-ways of the country—those separating states, as well as those wholly within states—has the Federal Congress ever established a ferry, wharf, or bridge, nor regulated the tolls or other compensation charged for the use thereof. The great rivers of the country which separate states —especially the Mississippi and Ohio—have upon them many ferries, many wharves, and are spanned by many bridges. All these improvements have been made under grants of authority from states, and not from the Federal Congress. And the tolls and other charges for the use of all such artificial facilities have been fixed and regulated by legislation of the states. Of course that great mass of legislation of the states which is essential to the public welfare—especially in the matter of protection from oppressive exactions—is all invalid, if the acts here in question conflict with the commerce clause of the Federal Constitution. Congress never has fixed or regulated tolls or other charges for the use of ferries, bridges or wharves. It is essential that there should be some regulation of these matters.. Of necessity these regulations have been made by the states themselves, because of the non-action of Congress. This always has been, and still is, the practical construction of the commerce clause of the Federal Constitution by Congress, by the Federal Courts, and by the states. It needs no argument to show that this practical construction ought to have controlling weight.

All such improvements of a local character are mere aids to commerce, that states may establish and regulate until Congress intervenes. Interstate commerce is concerned in the matter of such improvements, and charges for the use of them, but they are within the domain of the concurrent power of the states and Congress, and are out of and beyond the domain of the exclusive power of Congress concerning commerce.

As this court said of such state legislation as that here in question :

"Should such regulations interfere with the exercise of the commercial power of Congress, they may, at any time, be

superseded by its action." *Gloucester Ferry Co.* vs. *Pa*, 114 U. S., 196.

The fallacy of the argument for the plaintiff in error sufficiently appears, when its necessary results are considered.

If it were true, as claimed for plaintiff in error, that the matter of tolls for the use of interstate bridges is a matter of national importance, requiring uniformity of regulation, what authority would there be for legislation of any kind by states concerning such bridges or tolls? It will be observed that the franchises of the plaintiff in error authorize the establishing and conducting of an exclusively interstate business, and the compensation which it receives in the way of tolls is exclusively for interstate travel. It is as clear as anything can be that if states have no constitutional power to regulate tolls on interstate bridges established by themselves, or under their authority, then in the very nature of things, states can not grant a franchise which has, for its exclusive object, the establishing and maintaining a structure entirely interstate, and the demanding and receiving of tolls for travel which is exclusively interstate. The argument upon this branch of the case for plaintiff in error, would, if sound, destroy the plaintiff in error, and every privilege, franchise and immunity which it claims, for the reason that its corporate existence, and every right it possesses or claims, are derived solely from, and depend alone upon state legislation. It could exact no toll whatever for use of its bridge if its argument were sound, for Congress not having acted in the premises, "its non-action in such cases with respect to any particular commodity or mode of transportation, is a declaration of its purpose that the commerce, in that commodity, or by that means of transportation, shall be free." *Mobile Co.* vs. *Kimball*, 102 U. S., 69.

The demands which this court denied in the wharfage cases, and in the case involving tolls for use of a lock on a river, (*Huse* vs. *Glover*, 119 U. S.), were demands for total exemption from all charges for the use of the artificial facilities furnished under

state authority. There is not apparent any reason why those demands should not have been conceded, if the legislation here in question is to be deemed in conflict with the commerce clause of the Federal Constitution.

It is laid down in the text-books and decisions, and is manifestly true, that the object of the commerce clause of the Federal Constitution was to guarantee the freedom of commercial intercourse between the states, and to prevent the states from meddling with foreign commerce. It may be pertinently asked, what sort of an interference with the freedom of commercial intercourse between Ohio and Kentucky is it for the state of Kentucky by one act of its General Assembly to cut down to the extent of one-half the tolls that are, and long have been, exacted, under and by force of another legislative act of the same state? What sort of burden is it that Kentucky imposes on commerce between the two states by relieving that commerce of one-half of the charges which are already exacted for use of the bridge?

Whatever may be said concerning apprehended conflicting legislation of Ohio is conclusively answered by this court in the concluding part of the opinion in the Gloucester Ferry case:

"How conflicting legislation of the two states on the subject of ferries on waters dividing them is to be met and treated, is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware river" (114 U. S., 218.)

If it be said that the legislation here in question attempts to make a penal offense of something done or omitted beyond the territorial limits of Kentucky, the sufficient response is that there is no such question in this case. It will be time enough to consider that question when any act done or omitted by plaintiff in error beyond the limits of Kentucky is attempted to be punished criminally. The indictment upon which is based the judgment now before this court for review, alleges that the acts therein complained of were done in the county of Kenton,

in the commonwealth of Kentucky; and the acts alleged in the indictment, and none other, are in question here. It may be that anything done or omitted by the plaintiff in error, in Ohio, can not be made a penal offense by a Kentucky statute; but that can in no wise affect the validity or effect of the legislation here in question in Kentucky; that is a matter relating not to the constitutional validity of the statute, but to its enforcement. Fines are not the only means by which corporations can be called to account for violating their charters. It will be observed that the legislation here in question provides for a charter forfeiture proceeding if it be not obeyed.

The claim made in this connection by the plaintiff in error is one of conflict of laws, not one of state regulation of interstate commerce. If the legislation here in question can not reach acts or omissions of the corporation in Ohio, that does not affect the validity of the legislation in Kentucky. Certainly, this objection of plaintiff in error raises no Federal question, and, therefore, it is unimportant here.

III.

The charter of the Bridge Company is within the general law of Kentucky reserving power over corporate charters, and therefore subject to amendment or repeal, at the will of the legislature.

When the charter was enacted, there was in force this general law, Section 8, Chapter 68, General Statutes of Kentucky:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal, at the will of the legislature, unless a contrary intent be therein plainly expressed; provided, that, whilst privileges and

franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

It is not pretended that the charter contains anything negativing the right of the legislature to repeal or amend it.

This court has construed this statute in *Louisville Water Co.* vs. *Clark*, 143 U. S., 1, and said through Mr. Justice Harlan:

"But in respect to all the acts passed after 1856, amending the charter of, or relating to, the Water Company, including that of 1882, each must be read as if all the provisions of the act of 1856 were incorporated in it, because in no one of them is plainly expressed an intent to waive the right of amendment or repeal at the will of the legislature. In this view, the rights acquired by the Water Company under the act of 1882, were subject to the reserved power of amendment or repeal; saving, whenever that power was exerted, all rights previously vested. In short, the immunity from taxation, granted by the act of 1882, was accompanied with the condition—expressed in the act of 1856, and made part of every subsequent statute, when not otherwise expressly declared—that, by amendment or repeal of the former act, such immunity could be withdrawn. Any other interpretation of the act of 1856 would render it inoperative for the purposes for which, manifestly, it was enacted."

And in *Louisville Gas Co.* vs. *Citizens' Gas Light Co.*, 115 U. S., this court, through Mr. Justice Harlan, said of this statute:

"The language of this statute is too plain to need interpretation. It formed a part of the charter of the new Louisville Gas Company when incorporated in 1867, and the right of the legislature, by a subsequent act, passed in 1872, to incorporate another gas company to manufacture and distribute gas in Louisville, by means of pipes laid at its own cost, in the public ways of that city, so far from impairing the obligation of defendant's contract with the state, was authorized by its reserved power of amendment or repeal, unless it be that the act of January 22,

1869, 'plainly expressed' the intent that the charter of the new Louisville Gas Company should not be subject to amendment or repeal at the mere will of the legislature."

And then Mr. Justice Harlan proceeds to show that the act there in question did contain a "plainly expressed" intent that there should be no alteration in the corporation's charter without the consent of the corporation and Board of Councilmen of Louisville.

That statute was also construed by Mr. Justice Jackson, when on the Circuit bench, in *Hill* vs. *Glasgow R. R. Co.*, 41 Federal Rep., 610.

"The principle of these and other decisions upon the subject of amending or repealing charters under a reservation of power so to do is that *the legislature may change or modify the privileges and franchises which the state has granted to the corporation, and which concern the interests of the public;* but in dealing with what it has bestowed, either by way of withdrawal or of alteration, the state may not go further, and so legislate as to disturb, affect, or impair rights either of the corporation or of its shareholders, previously acquired, while the corporate functions were being lawfully exercised. All rights thus acquired, of whatever character, are surrounded and protected by constitutional sanctions and guarantees higher and superior to the legislative power of amendment or repeal. The decisions of the Court of Appeals of this state clearly recognize these general principles.

* * * * * *

"The rights reserved by the General Statutes *to amend or repeal privileges and franchises conferred by the charter* is one thing, but the power to take from the stockholders or others *rights or property interests, acquired or vested before such repeal or amendment,* is another and quite a different thing. The first comes within the legislative authority, the second lies beyond the limit of such authority, because the legislature can not

defeat or impair rights previously vested, *which have sprung up or grown out of such corporate privileges and franchises while the corporation was allowed to exercise the same.* Applying these principles to the case made by the bill, the conclusion seems to be irresistible that the amendment of April 8, 1880, in so far as it directed that the proceeds arising, or to arise, from the sale or lease of the road should be applied, after paying the company's debts, to the liquidation of the indebtedness of two of the company's stockholders, to the exclusion of the other stockholders, was beyond the legislative power."

In *C. & O. R. R. Co.* vs. *Barren Co. Court*, 10 Bush., 609, the Kentucky Court of Appeals, through Judge Lindsay, said of the statute:

"The act was intended to preserve to the state control over all acts ol incorporation thereafter passed. Experience had demonstrated the propriety of, if not the absolute necessity for, such a reservation of power; and it will be a manifest disregard of the clearly expressed will of the legislature for the courts to resort to technical rules of construction or finely drawn legal implications to escape the effect of the plain declaration that all charters of and grants to corporations shall be subject to amendment and repeal unless a contrary intent be plainly expressed."

"We do not doubt the power of the legislature to amend at will appellant's charter, provided the amendment or modification does not affect its *title to or right of enjoyment in some property right* that previously vested."

It would be useless to cite the many decisions of this court construing and determining the effect of other reservation statutes. In all of them the unlimited power of the legislature, under such statutes, to deal with the franchises of the corporation is affirmed. The limitation of the legislative power under such statutes applies only to property and contract rights that have accrued from the exercise of the powers and franchises. That

limitation upon the legislative power has no concern with any franchise or power granted by the charter itself.

The acts of 1890, which are here drawn in question, deal solely with a grant contained in the corporate charter itself, and not with any property or contract right that the corporation may have acquired by exercising the powers and franchises granted by the charter. It follows that the acts of 1890 were a proper exercise of the legislative power reserved to the state under the general law of 1856.

As to the question whether or not the provision in the charter of plaintiff in error fixing a maximum of tolls would have made a contract if the general reservation act of Kentucky had not been in force when the charter was granted, it is deemed proper, in view of the argument already submitted on a like question in the case of the Covington & Cincinnati Bridge Company, to only refer to *Stone* vs. *Farmers' Loan & Trust Co.; Stone* vs. *Illinois Central R. R. Co.*, 116 U. S.; *Ruggles* vs. *Illinois*, 108 U. S., *and Georgia R. R. & B. Co.* vs. *Smith*, 128 U. S., as establishing the negative.

IV.

The exercise, by the legislature, of the governmental power of fixing a maximum of tolls for the use of property affected with a public interest, is not subject to review in the courts; and if the courts had power to review such legislative action, no case for the exercise of such power is presented here.

In support of the first branch of the proposition affirmed above, the defendant in error relies, of course, on *Munn* vs. *Illinois*, 94 U. S., and the other cases decided at the same time, and *Budd* vs. *New York*, 143 U. S. This case is unlike that of *R. R. Co.* vs. *Minnesota*, 134 U. S., because here the legislature

has itself fixed the maximum of charge, not delegated the power to do so. And the principles contended for in the dissenting opinions in *Munn* vs. *Illinois* and *Budd* vs. *New York* have no application here, because this is not the case of a natural person not exercising special privileges forbidden to the community at large; but this is the case of a corporation created by the state for public purposes, and exercising franchises obtained by special grant from the state, and the exercise of those special franchises is regulated by the acts here drawn in question.

But this case falls within the principles, upon which this court proceeded, in *R. R. Co.* vs. *Wellman*, 143 U. S., 339.

The legislation here in question relates only to the tolls for use of foot-ways and wagon-ways of the bridge. The tolls for use of the railway portion of the structure are not affected. In the affidavit of Mr. Rohner the cost of the foot-ways and wagon-ways of the bridge is "estimated" at $600,000; and to that part of the bridge the affiant also "estimates and apportions" $600,000 of the encumbrance which is upon the entire structure. The receipts from tolls on the foot-ways and wagon-ways are given at $22,125.39, for the time from September 2, 1889, when the bridge was open to travel, till April 30, 1890, and expenditures for the same time are stated at $12,185.90, and to this there is then added $20,000, being 5 per cent. interest for the eight months on $600,000. Then "affiant further submits as correct a statement of interest on bonds, expenses and what would have been the earnings and deficits upon that portion of said bridge used for wagon-ways and foot-ways, if the said rates of toll proposed by the said legislature of Kentucky, as above stated, had been in operation during each of said months." This is followed by the detailed statement of what the tolls received would have amounted to during the eight months, from September, 1889, till April, 1890, at the rates fixed in the acts of 1890, the aggregate being $10,692.37; and then comes this statement:

"Affiant further says that said bridge has recently been

completed, and that the said structure is entirely new, and that so far there has been no expenses whatever for repairs for ordinary wear and tear upon the said bridge, and that a cost for any such purposes is not included in his statement of expenses; that, hereafter, as travel over said bridge continues *and increases*, said bridge will, in all probability, need some repairs, which will add to the expenses already stated."

It will be observed that the affiant admits that, even at the old rates, the travel over the bridge will increase. With this admission, there is not even an "estimate" of the future effect of the acts of 1890 upon the receipts of the bridge company. The statement and "estimate" of Mr. Rohner is confined entirely to the eight months from September 1, 1889, till April 30, 1890. There is no "statement" or "estimate," in any form, as to what will be the effect of the acts of 1890 in the future, if put into operation, either as to travel over the bridge or receipts from tolls. And although the case was tried, and the judgment of the Kenton Circuit Court, here sought to be reversed, was rendered September, 1893, no disclosure of tolls received from the foot-ways and wagon-ways, nor expenditures thereon, is made for the time, or for any part of the time, after April 30, 1890. No disclosure is made as to what the alleged expenses consisted of.

"Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? (In this case, we have the mere *ex parte* affidavit of one witness.) Must court and jury accept their opinions as a finality? Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and therefore the earnings? At any rate, must the court assume that it has no such effect; and, ignoring all other considerations, hold, as matter of law, that a reduction of rates necessarily diminishes

the earnings?" *Chicago, etc. R. R.* vs. *Wellman*, 143 U. S., 339.

"Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements and without the fullest disclosure of all material facts." *Ibid.*

It will be observed that the plaintiff in error has carefully refrained from disclosing the receipts and expenditures on the entire bridge. The bridge is an entirety, and so is the business of maintaining and operating it. The question here is not whether, under the operation of the acts of 1890, the tolls from the foot-ways separately considered, will produce a sufficient income from that part of the structure, or whether under the operation of those acts the wagon-ways separately considered will produce a sufficient income from that part of the structure. The question is whether under the operation of those acts the tolls on the entire structure will produce a reasonable income. As the Court of Appeals said concerning this matter, notwithstanding the alleged effect of the acts of 1890 as to the foot-ways and wagon-ways, "the entire structure may be yielding a handsome income."

Certainly, in this state of the record it is useless further to discuss the question whether the acts of 1890 make an unreasonable reduction of the tolls of plaintiff in error, or operate so as to take property without due process of law.

It is respectfully asked that the judgment be affirmed.

WM. GOEBEL,
For Defendant in Error.

ATTORNEY-GENERAL WM. J. HENDRICK,
Of Counsel.

AUTHORITIES CITED.

As to interstate commerce.

Ky. & Ind. Bridge Co. vs. L. & N. R. R. Co., 37 Fed. Rep., 616.
Mobile County vs. Kimball, 102 U. S., 691.
The Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196.
Newport & Cincinnati Bridge Co. vs. U. S., 105 U. S., 470.
Packet Co. vs. Keokuk, 95 U. S., 80.
Huse vs. Glover, 119 U. S., 543.
Ouachita etc. Packet Co. vs. Aiken, 121 U. S., 444.
Conway vs. Taylor's Ex'rs, 1 Black, 365.

As to legislative control of the charter.

Louisville Water Co. vs. Clark, 143 U. S., 1.
Louisville Gas Co. vs. Citizens' Gas Light Co., 115 U. S.
Hill vs. Glasgow R. R. Co., 41 Fed. Rep., 610.
C. & O. R. R. Co. vs. Barren Co. Ct., 10 Bush., 609.
Stone vs. Farmers' Loan & Trust Co., 116 U. S.
Stone vs. Illinois Cent. R. R. Co., 116 U. S.
Ruggles vs. Illinois, 108 U. S
Georgia R. R. & B. Co. vs. Smith, 128 U. S.

Legislative action fixing a maximum of tolls is not subject to review in the courts.

Munn vs. Illinois, 94 U. S.
Railway Co. vs. Minnesota, 134 U. S.
Budd vs. New York, 143 U. S.

If courts had power to review legislative action fixing a maximum of tolls, no case for the exercise of that power is presented here.

Railway Co. vs. Wellman, 143 U. S., 330.